Supreme Court, U.S.
FILED
95-1227 JAN 31 1996
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT,
Petitioner,

v.

PAUL DOUCET, RUSSELL DOUCET, MICHAEL DOUCET,
and HERBERT CHAMPAGNE,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit State of Louisiana

---

PETITION FOR A WRIT OF CERTIORARI

RICHARD P. IEYOUB
Attorney General
STEPHEN J. CAIRE *
Special Assistant Attorney General
ANDREE MATHERNE CULLENS
Attorney at Law
VEZINA AND ASSOCIATES
401 Weyer St., P.O. Box 461
Gretna, Louisiana 70054
(504) 368-5223
Attorneys for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

When a state collects information from different records, surveys, reports, and data, such as accident reports and bridge tender reports, and then compiles that information to evaluate potential accident sites and hazardous locations pursuant to 23 U.S.C. 152, does 23 U.S.C. 409, as amended in 1991 and 1995, prevent discovery and introduction of just the compiled documents, or does it also exclude the data collected for those documents?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	5
REASONS FOR GRANTING THE PETITION	8
I. THE LOUISIANA AND ARIZONA COURTS' INTERPRETATION OF 23 U.S.C. 409 UNDERMINES CONGRESS' POLICIES AND PURPOSE IN ENACTING THE INTERMODAL SURFACE TRANSPORTATION INFRASTRUCTURE ACT OF 1991 BY ALLOWING DISCOVERY AND ADMISSION AT TRIAL OF INFORMATION USED TO GENERATE THE DOCUMENTS PRODUCED IN COMPLIANCE WITH 23 U.S.C. §§ 152, 144, AND 130	8
A. Congress' policy and purpose underlying the amendments to 23 U.S.C. 409 was to give state and local officials the flexibility to make crucial decisions on how their funds should be best used	8
B. The plain language and ordinary meaning of the words used in 23 U.S.C. 409 indicates Congress intended to exclude facts and documents prior to the 1995 amendment	11

TABLE OF CONTENTS—Continued

Page

C. The jurisprudence and history of Section 409 supports DOTD's position that Congress intended and the plain language of the document excludes both facts and documents 14

D. The congressional goal of promoting state flexibility in allocating limited funds is undermined by court decisions like Louisiana's because they change a states' focus from performing those projects that it has evaluated and prioritized to performing those projects that courts have decided, in a vacuum, are deficient to avoid future costly judgments 21

II. THE 1995 AMENDMENT TO 23 U.S.C. 409 SHOULD BE RETROACTIVELY APPLIED CAUSE IT IS MERELY A CLARIFICATION OF WHAT CONGRESS ALWAYS INTENDED OR IN THE ALTERNATIVE, DOES NOT RESULT IN MANIFEST INJUSTICE 28

CONCLUSION 30

APPENDICES

APPENDIX A 1a

APPENDIX B 20a

APPENDIX C 21a

APPENDIX D 24a

APPENDIX E 38a

APPENDIX F 46a

APPENDIX G 71a

TABLE OF AUTHORITIES

Cases

	Page
Bearden v. Southern Railway Co., No. CV88-PT-0005-5 (N.D. Ala. July 11, 1988)	17
Beecher v. Keel, 607 So.2d 549 (La. 1992)	28
Bradley v. School Board of Richmond, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974)	28
Claspill v. Missouri Pacific Railroad Company, 793 S.W.2d 139 (Mo. banc 1990)	16, 28
Cousins v. State, Department of Transportation, 89-2066, 572 So.2d 1205 (La. App. 1st Cir. 1990)	22, 23
CSX Transportation v. Easterwood, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993)	6, 20
Desalvo v. State of Louisiana and the Department of Public Safety and Corrections, 624 So.2d 897 (La. 1993)	18
Doucet v. Champagne, 94 1631 (La. App. 1st Cir. 4/7/95); 657 So.2d 92 (La. App. 1st Cir. 1995)	22-25
Duncan v. Union Pacific Railroad, 790 P.2d 595 (Utah App. 1990)	19, 20
Hagerty v. Southern Railway Company, 133 F.R.D. 34 (E.D. Mo. 1990)	18
Harrison v. Burlington Northern Railroad Company, 965 F.2d 155 (7th Cir. 1992)	8
Jones v. Rath Packing Co., 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977)	28
Lusby v. Union Pacific Railroad, 4 F.3d 639 (8th Cir. 1993)	17
Mancuso v. Populus, 530 So.2d 548 (La. 1988)	25
Martinolich v. Southern Pacific Transportation Company, 532 So.2d 435 (La. App. 1st Cir. 1988)	8, 15
Maryland v. Louisiana, 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981)	11
Perkins v. Ohio Department of Transportation, 584 N.E.2d 794 (Ohio App. 10th Dist. 1989)	17
Robertson v. Union Pacific Railroad Company, 954 F.2d 1453 (8th Cir. 1992)	16-17
Sawyer v. Illinois Central Gulf Railroad Company, 606 So.2d 1069 (Miss. 1992)	17, 28

TABLE OF AUTHORITIES—Continued

	Page
Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 77 L.Ed. 2d 490, 103 S.Ct. 2890 (1983)	11
Southern Pacific Transportation Company v. Yarnell, 890 P.2d 611 (Ariz. 1995)	12, 20
Southern Pacific Transportation v. Yarnell, 863 P.2d 271 (Ariz. App. Div. 1st 1993)	15
Taylor v. St. Louis Southwestern Railway Company, 746 F.Supp. 50 (D. Kan. 1990)	16
Theriot v. Lasseigne, 640 So.2d 1305 (La. 1994)	29
Wiedeman v. Dixie Electric Membership Corporation, et al., 627 So.2d 170 (La. 1993); *cert. denied*, —— U.S. ——, 114 S.Ct. 2134, 128 L.Ed.2d 864 (1994)	4, 12, 18, 19
Wright v. Norfolk and Western Railway Company, 427 S.E.2d 724 (Va. 1993); 245 Va. 160 (Va. 1993)	17

Constitution and Statutes

U.S. Const. Art. VI, cl 2	11, 28
23 U.S.C. 152	2
23 U.S.C. 402	13
23 U.S.C. 409	4, 8, 14, 27
28 U.S.C. 1257	2
Public Law 104-59, Section 323	11, 14
La. R.S. 48:229	26

Periodicals

H.Rep. No. 171(I), 102nd Cong., —— Sess. ——, *reprinted in*, 1991 U.S. Code Cong. & Admin. News 1526	4, 6, 9-11, 21-22, 25, 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. ———

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT,
Petitioner,

v.

PAUL DOUCET, RUSSELL DOUCET, MICHAEL DOUCET, and HERBERT CHAMPAGNE,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit State of Louisiana

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgment of the State of Louisiana, Court of Appeal, First Circuit in the case No. 94 CA 1631, lately pending therein, rendered in this proceeding on April 7, 1995.

OPINIONS BELOW

The judgment of the state trial court for the Parish of St. Tammany, unreported, was rendered on January 20, 1994 and appears as Appendix D hereto. The original Judgment and the Judgment on Rehearing of the First Circuit Court of Appeals for the State of Louisiana, *Doucet v. Champagne*, 94 1631 (La. App. 1st Cir. 4/7/95); 657 So. 2d 92 (La. App. 1st Cir. 1995) was entered on

April 7, 1995 and June 21, 1995 respectively and appears as Appendix A hereto.

The denial of review by the Louisiana Supreme Court, *Doucet v. Champagne*, 95-C-1759, was entered on November 3, 1995 and appears as Appendix B, p. 20a hereto.

STATEMENT OF JURISDICTION

No application for rehearing to the Louisiana Supreme Court is permitted and this petition for Certiorari was filed within ninety days of that court's denial of review.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257.

STATUTES INVOLVED

23 U.S.C. 152

23 U.S.C. 402

23 U.S.C. 409

STATEMENT OF THE CASE

On March 19, 1992, Respondents, the Doucets, filed suit against Champagne, also a Respondent, and Petitioner, the Louisiana Department of Transportation and Development arising out of an accident on February 2, 1992 on the U.S. Highway 11 bridge. The basis for the suit against the Department of Transportation and Development (hereinafter referred to as "DOTD") is an allegation that the drawbridge located on the U.S. Highway 11 bridge had a defective grid which caused Mr. Champagne to lose control of his Mustang automobile crossing the center line into the oncoming lane of traffic, which in turn caused the accident.

During the trial, the Doucets attempted to introduce bridge tender reports to which DOTD objected as being inadmissible pursuant to 23 U.S.C. 409. Appendix F, p. 55a-57a. DOTD objected to the introduction of the bridge tender reports after the Doucets attempted to in-

troduce those records, in globo, along with complaint records and bridge damage reports. *Id.* The trial judge sustained DOTD's objection and the Doucets proffered the evidence. Appendix F, p. 57a-58a.

Likewise, the Doucets attempted to introduce accident reports at trial. Appendix F, p. 58a-59a, 60a. DOTD also objected to these reports because "[t]he federal government requires the Department to maintain an accident file in order to receive certain safety moneys." Appendix F, p. 47a; Appendix F, p. 59a-66a. Again, the trial court sustained DOTD's objection, saying:

> "But what I'm going to do in this case, I am going to rule that 23 USC Section 409 is applicable in this case and I am going to sustain your objection, because I think I could set here and listen to all this for two days and it really would not have that much bearing on this case anyway. The bridge is either defective or it's not defective.

Appendix F, p. 66a.

Therefore, the Doucets proffered the accident reports. See, Appendix F, p. 67a-68a. As a defense to this proffer, DOTD also proffered a chart based upon the information contained in the accident reports. See, Appendix F, p. 68a-70a.

The trial judge found that:

> This case must be decided on the testimony and the creditability afforded the expert witnesses. Both sides produced experts to support their respective contentions. I find the basis for the conclusions reached by the State's experts to be sound technically and well grounded in common sense. Under the circumstances existing on February 2, 1992, the Champagne vehicle traveling at 35 miles per hour simply would not have done what he said it did. I, therefor, accept the conclusions of the State's experts as the truth.

Appendix D, p. 33a-34a.

Accordingly, the trial judge rendered judgment absolving DOTD from any liability in this case.

The Louisiana First Circuit Court of Appeal reversed holding DOTD one hundred percent at fault. Applying the Louisiana Supreme Court's interpretation that section 409 protects only compiled documents, the appellate court concluded "that the trial judge erred in excluding some of the evidence. According to *Wiedeman*, the individual accident reports, [FN3] bridge tenders' reports, damage reports and complaint records were admissible." [1] Appendix A, p. 6a. In footnote three, the court said:

> Although the trial transcript indicates that the Doucets proffered individual accident reports from 1990 and 1991, we were unable to locate these reports in the record. However, DOTD did proffer an enlarged spread sheet which gives information on accidents from 1982 to 1989. Two DOTD experts prepared this exhibit for trial by reviewing individual accident reports. Because the spread sheet was prepared using individual accident reports and was not compiled under Section 409, the spread sheet should have been included as evidence.

Id.

The court also raised trial judge's future medical award to Russell Doucet from $150,000.00 to $2,000,000.00. Appendix A, p. 11a.

On June 21, 1995, the appellate court granted a rehearing to Plaintiffs and increased Paul Doucet's lost wage award from $50,000.00 to $110,246.00 and Michael Doucet's loss of earning capacity award from $100,000.00 to $261,499.00. Appendix A, p. 18a. The appellate court denied Champagne's request that the court award him damages in light of their decision that he was not

---

[1] *Wiedeman v. Dixie Electric Membership Corporation, et al.*, 627 So.2d 170, 173 (La. 1993); *cert. denied*, —— U.S. ——, 114 S.Ct. 2134, 128 L.Ed.2d 864 (1994).

responsible for the accident. Appendix A, p. 16a. The final result of the court of appeals decision brings the state's liability from zero to over five million dollars ($5,000,000.00) which after adding interest and costs would reach approximately seven million (7,000,000.00). See, Appendix A, pp. 16a, 18a, and Appendix D, p. 36a.

DOTD applied for a Writ of Review to the Louisiana Supreme Court of both the appellate court's original decision and the decision on rehearing on July 12, 1995. Appendix C, p. 21a. On July 24, 1995, Champagne also applied for a Writ of Review to the Louisiana Supreme Court. On November 3, 1995, the Louisiana Supreme Court denied the applications of both DOTD and Champagne. Appendix B, p. 20a.

SUMMARY OF THE ARGUMENT

This Honorable Court should review the decision of the First Circuit Court of Appeals for the State of Louisiana because the decision undermines the policies and goals set by the United States Congress. In addition, the appellate court's decision is contrary to the decisions of the Seventh and Eighth Federal Appellate Courts interpreting 23 U.S.C. 409. Finally, the decision twists the plain language of the statute to impose a five million dollar judgment ($5,000,000.00), which after adding judicial interest and costs amounts to approximately seven million dollars ($7,000,000.00), upon the State of Louisiana.

23 U.S.C. 409, as amended in 1991, reads:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall

> not be subject to discovery or admitted into evidence in a Federal or State Court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

This section is part of comprehensive modification of the Highway Safety Act. It reflects Congress' purpose which is to "give state and local officials the flexibility to make crucial decisions on how their funds should be used." H.Rep. No. 171(I), 102nd Cong., —— Sess. ——, *reprinted in,* 1991 U.S. Code & Admin. News 1526, 1531. The rest of the modification establishes that states may obtain funds if they take certain steps to ensure that the funds are efficiently spent on the repair of roads, bridges, and railroads. Unlike railroads, roads and bridges have traditionally been the states' sole responsibility to build, maintain, and upgrade.[2] However, Congress recognized that no state has enough funds to perform all the repairs and upgrades on every bridge and road which needs it. Moreover, Congress found that the injury costs related to motor vehicle accidents was a significant problem in this area. Therefore, they enacted changes to Title II, Chapter 4, which includes Section 409, in an attempt to balance public welfare against the necessity of decreasing economic and bureaucratic burdens on the states. H.Rep. No. 171(I), 102nd Cong., —— Sess. ——, *reprinted in,* 1991 U.S. Code Cong. & Admin. News 1526, 1561.

Most courts have recognized and it is plainly obvious from the language of the statute that Congress intended to cover a wide range of documents and information by enacting Section 409. However, two state courts so far, Louisiana and Arizona, have misinterpreted the words

---

[2] See, *CSX Transportation v. Easterwood,* 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed. 2d 387, 399 (1993) ("the responsibilities of railroads and the State are, and traditionally have been, quite distinct.").

"data compiled" to mean "compilation," thereby allowing the facts underlying the compilations to come into evidence. Thus, plaintiffs are still able to present the same information that the state used to perform its evaluations and rank roads and bridges on a priority basis.

Courts, as a result of their misinterpretation of Section 409, also evaluate these roads, and bridges without the benefit of comparison to other roads and bridges, and are finding states liable for failure to upgrade or repair the roads and bridges. Thus, this misinterpretation renders any protection of the state's evaluations illusory because, unless the state reaches the same decision the court does, the state will be found liable since the state did not perform the upgrade. In the states where the judiciary imposes judgment on the legislature and agencies for failure to upgrade or repair, states have to repair those things first, regardless of cost-efficiency or priority, to avoid future costly judgments. Therefore, Congress's intent that its funds be used efficiently is thwarted.

After the Louisiana and Arizona decisions that undermine these goals, Congress amended 23 U.S.C. 409 in November, 1995 adding "or collected" after the word "compiled." This amendment clarifies that Congress indeed intended Section 409 to be broadly construed to exclude facts and documents. Therefore, the Louisiana First Circuit Court was clearly wrong in including accident reports and bridge tender reports and using this information to overturn the trial court judge's decision. This improper application and consideration of evidence resulted in a seven million dollar ($7,000,000.00) liability on DOTD. Moreover, the 1995 amendment to 23 U.S.C. 409 shows that Congress always intended to exclude facts and documents; the amendment did not change the law. However, even if it does represent a change in the law, it should be applied retroactively because its application to this case would not cause manifest injustice.

REASONS FOR GRANTING THE PETITION

I. THE LOUISIANA AND ARIZONA COURTS' INTERPRETATION OF 23 U.S.C. 409 UNDERMINES CONGRESS' POLICIES AND PURPOSE IN ENACTING THE INTERMODAL SURFACE TRANSPORTATION INFRASTRUCTURE ACT OF 1991 BY ALLOWING DISCOVERY AND ADMISSION AT TRIAL OF INFORMATION USED TO GENERATE THE DOCUMENTS PRODUCED IN COMPLIANCE WITH 23 U.S.C. §§ 152, 144, AND 130.

A. Congress' policy and purpose underlying the amendments to 23 U.S.C. 409 was to give state and local officials the flexibility to make crucial decisions on how their funds should be best used.

Since the enactment of 23 U.S.C. 409, courts have indicated that the purpose of this section is "to facilitate candor in administrative evaluations of highway safety hazards. . . . *Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992)." *Harrison v. Burlington Northern R.R. Co.*, 965 F.2d 155, 160 (7th Cir. 1992). However, this is not the only purpose of 23 U.S.C. 409.

Congress, in House Report No. 102-171(I), set out the purpose and policy of the Intermodal Surface Transportation Infrastructure Act of 1991. This Act modified Section 409 to exclude, from both admission and discovery, "reports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway highway crossings pursuant to sections 130, 144 and 152 of this title." 23 U.S.C. 409.[3]

---

[3] Prior to the 1991 modification, the section only prevented admission of reports, surveys, schedules, lists, or data into evidence at Federal or State court proceedings. The amendment to prevent the discovery of this information came after the Louisiana First Circuit Court of Appeals decisions in *Martinolich v. Southern Pa-*

The underlying goal of the 1991 Act was to increase our nation's ability to compete in the global market. H. Rep. No. 171(I), 102nd Cong., —— Sess. ——, *reprinted in*, 1991 U.S. Code Cong. & Admin News 1526, 1529. Congress found that "[t]he failure to improve our transportation ssytem from its present state will by 1995, reduce the Gross National Product by 3.2%, disposable income by 5.9%, employment by 2.2%, and it will increase the consumer price index by 8%." *Id.* "In essentially rewriting the national highway map, the committee is stressing intermodality and flexibility in addressing particular highway transit needs." *Id.* at 1530. Congress felt "that one of the most important things this legislation can do is give state and local officials the flexibility to make crucial decisions on how their funds should be used." H.Rep. No. 171(I), 102nd Cong., —— Sess. ——, *reprinted in*, 1991 U.S. Code Cong. & Admin. News 1526, 1531. However, flexibility had to be achieved while simultaneously creating "a coordinated, flexible network of diverse but complimentary forms of transportation to move people and goals in the most energy-efficient manner." *Id.* at 1532. Congress thought these two goals were necessary and were "how best to reshape our national transportation infrastructure to provide the economic

---

cific Transportation Company, 532 So.2d 435 (La. App. 1st Cir. 1988).

In *Martinolich*, the First Circuit overruled the trial court's determination "that 23 U.S.C. § 409 created a privilege which made all information collected non-discoverable." *Id.* at 437. The court held "that the trial court's conclusion that a privilege was created as to 'all information gathered pursuant to the federal programs covered by this statute' was clearly wrong because it extends the literal wording of 23 U.S.C. § 409, which enumerates, *inter alia*, reports, surveys, and data that are *compiled* for a specific purpose (compliance with either 23 U.S.C. §§ 130, 144, or 152) to *'all information gathered'* (emphasis ours) pursuant to these programs." *Martinolich*, 532 So.2d at 437. Thus, the court found that these things were not privileged, and under Louisiana's Code of Civil Procedure they could be subject to discovery.

underpinnings for the Nation to compete internationally." *Id.* at 1533.

Congress felt the goals of flexibility and unity could only begin with strategic planning.

> The planning begins with a clear understanding of infrastructure needs and the options available to respond to them. Needed is an improved understanding of what must be done, what can be done within the limits of available resources, and a prioritization of needed infrastructure projects. Levels of revenue available should also be identified, along with the consideration of contingencies in the event of revenue short falls. The result will be improved public and private sector investment choices and wise utilization of tax dollars.

Id. at 1539.

Clearly, Congress felt that money and information were the two most fundamental obstacles to planning and achieving the goals of a safe, unified transportation system. Thus, each section of the Act sets out various rules and guidelines designed to promote information gathering and cost efficiency. *Id.* at 1551-1553.

23 U.S.C. Section 409 appears under Title II entitled "Highway Safety," Appendix E, p. 40a, 42a. In the portion of the report addressing Title II, Congress specifically discussed the costs related to and the large number of injuries and deaths caused by traffic accidents. "There are twice as many highway deaths as there are homicides. Motor vehicle accidents cost our society more than $48 billion in injury costs every year." H.Rep. No. 171(I), 102nd Cong., —— Sess. ——, *reprinted in,* 1991 U.S. Code Cong. & Admin News 1526, 1561. Congress also specifically stated that throughout Title II, "the Committee has attempted to make the public welfare its first and foremost consideration, while persevering in its attempt to create a new intermodal transportation system that re-

flects greater state participation and places fewer burdens on state programming." H.Rep. No. 171(I), 102nd Cong., —— Sess. ——, *reprinted in*, 1991 U.S. Code Cong. & Admin. News 1526, 1561. Thus, each section of Title II, including Section 409, has as the underlying purpose of balancing the interests of public welfare while decreasing the different types burdens on the state that arise in different forms.

After balancing the competing concerns of public welfare against allowing states to prioritize and maintain state safety programs by placing fewer burdens on those programs, Congress amended 23 U.S.C. 409 to prevent both discovery and admission of "reports, surveys, schedules, lists, or data compiled or collected" pursuant to 23 U.S.C. §§ 130, 144, and 152. Public Law 104-59, Section 323. From the plain language of Section 409, Congress was concerned about the effect that State Federal tort actions were having on their goals of increasing information to allow the most efficient use of tax dollars.

B. The plain language and ordinary meaning of the words used in 23 U.S.C. 409 indicates Congress intended to exclude facts and documents prior to the 1995 amendment.

Where a state statute conflicts with or frustrates federal law, the former must give way. US Const, Art. VI, cl 2; *Maryland v. Louisiana*, 451 U.S. 725, 746, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981). One should look to the text and structure of the statute at issue to determine whether a statute pre-empts state law and what the scope of that preemption is. *Shaw v. Delta Air Lines Inc.*, 463 U.S. 85, 95, 77 L.Ed.2d 490, 103 S.Ct. 2890 (1983).

In reading the plain language of the statute, data is excluded if it is compiled. The ordinary meaning of data is "facts." That data, or facts, are what Congress intended to exclude is shown by the repetition at the end of Section 409 of the clause "*reports, surveys, schedules, lists, or*

data." Thus, the statute, as it is written, excludes all data, not just compiled data. However, the Arizona Supreme Court relied on the Louisiana Supreme Court's decision in *Wiedman v. Dixie Electric Membership Corporation et al,* 627 So.2d 170, 173 (La. 1993); *cert. denied,* —— U.S. ——, 114 S.Ct. 2134, 128 L.Ed.2d 864 (1994), and created two arguments that twist the language of Section 409 to allow the introduction of the underlying facts used in the state's evaluations. *Southern Pacific Transportation Company v. Yarnell,* 890 P.2d 611 (Ariz. 1995).

First, the Arizona Supreme Court interpreted the plain language of the statute and converted "compiled" from a verb to a noun so that the word "data" became "compilation." *Southern Pacific,* 890 P.2d at 613. Second, it looked at 23 U.S.C. §§ 130, 144, and 152 to construe Section 409's use of the words survey, data, report, and schedule as "words of art," which described particular documents. *Id.* at 614.

However, if "data compiled" means "compilation" then the statute would not make grammatical sense. It would read "reports, surveys, schedules, lists, or compilations for the purpose of identifying, evaluating, or planning. . . ." Clearly, this phrase is missing an important element, a verb; that verb is "compiled." Moreover, if Congress meant to confine the protection to documents only, then they would have used the restrictive word "document" instead of using the all-encompassing word "data."[4] Also, they would have inserted "compilation" instead of "data" as the last word of the Section which reads, ". . . arising from any occurernce at a location mentioned or addressed in such reports, surveys, schedules, lists, or data."

---

[4] Webster's New World Dictionary defines "data" as "facts or figures from which conclusions can be drawn," and "document" as "anything printed, written, etc. that is relied upon to record or prove something." Webster's New World Dictionary and Thesaurus, 1996 at 152 and 180.

Moreover, the words "report, survey, schedule, list, and data" are clearly not meant to be words of art. In 23 U.S.C. Section 402(k)(1) appears the following provision, which is almost identical to the language of Section 409:

> Subject to the provisions of this subsection, the Secretary shall make a grant to any State which includes, as part of its highway safety program under section 402 of this title, the use of a comprehensive computerized safety recordkeeping system designed to correlate data regarding traffic accidents, drivers, motor vehicles, and roadways. Any such grant may only be used by such State to establish and maintain a comprehensive computerized traffic safety recordkeeping system or to obtain and operate components to support highway safety priority programs identified by the Secretary under this section. *Notwithstanding any other provision of law, if a report, list, schedule, or survey is prepared by or for a State or political subdivision thereof under this subsection, such report, list, schedule, or survey shall not be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report, list, schedule, or survey.*[5] (emphasis added).

This section makes no reference to 23 U.S.C. §§ 130, 144, or 152. However, reports, lists, schedules, and surveys are the same documents identified in Section 409, and in Section 402 they clearly are meant to convey their ordinary meanings.[6] Since Sections 402 and 409 are part of the same Title, these words have the same meaning

---

[5] This section was also added in the 1991 amendments. See, Appendix E, p. 40a-41a.

[6] In addition, it is significant that the word data is not included in this list. Since accident reports are already used to determine hazardous locations pursuant to 23 U.S.C. § 152, that date or information is already excluded pursuant to Section 409. Thus, there is no need to add "data." Appendix E, p. 39a.

throughout the Title. It is abundantly clear that Congress intended that these words should be given their ordinary meaning in Section 409, as they are in Section 402; clearly, the words in Section 409 are not words of art and facts and documents are excluded.

On November 28, 1995, Public Law 104-59 officially amended 23 U.S.C. 409 to read:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists or data compiled *or collected* for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State Court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data. (Emphasis added).

The insertion of "or collected" makes it impossible to read the word "compiled" as an adjective or as the noun "compilation." "Data compiled or collected" is protected. It is the data or "information" that is protected—not just documents which reflect evaluations and compilations of that data. Thus, Congress has again overruled the Louisiana Courts' narrow interpretation of 23 U.S.C. 409 because it does not conform with the Congressional intent underlying the statute.

C. The jurisprudence and history of Section 409 supports DOTD's position that Congress intended and the plain language of the document excludes both facts and documents.

To determine the Congressional intent or purpose in enacting and amending 23 U.S.C. 409, it is helpful to

look at earlier cases interpreting this statute. As discussed in footnote one, *supra, Martinolich v. Southern Pacific Transportation Company,* 532 So.2d 435 (La. App. 1st Cir. 1988) was the first reported decision to interpret the scope of Section 409's exclusion of evidence. There, the First Circuit Court of Louisiana held that Section 409 did not create a privilege which made "all information collected non-discoverable." *Martinolich,* 532 So.2d at 437, *writ denied,* 535 So.2d 745 (La. 1989); *cert. denied,* 490 U.S. 1109, 109 S.Ct. 364, 104 L.Ed.2d 1027 (1989). The court construed the statute narrowly to protect only "certain documents." *Id.*

In 1991, only two years after this Honorable Court denied Writs of Certiorari in *Martinolich,* Congress amended 23 U.S.C. 409 "clarifying that the privilege indeed does bar discovery." *Southern Pacific Transportation v. Yarnell,* 863 P.2d 271, 275 (Ariz. App. Div. 1st 1993).[7] Congress clearly meant to make "reports, surveys, schedules, lists, or data" privileged both from discovery and admission at trial. Thus, the Louisiana First Circuit Court's narrow reading of the statute was incorrect. However, Congress did not specifically address whether it meant to give narrow protection to only a "state's self-critical evaluations and conclusions from outside scrutiny" or if it meant to give broad protection to "all information collected" as the Louisiana trial court judge held in *Martinolich.*[8]

At the time of the 1991 amendment, all other reported court opinions broadly interpreted Section 409 to exclude "information collected." Essentially, most courts interpreted Section 409 by reading the word "compiled" as a

---

[7] This decision was subsequently overruled. See discussion, *supra* at pp. 12-14.

[8] The 1995 amendment inserting the words "or collected" clearly shows that the Louisiana trial court's decision in *Martinolich* reflected an accurate reading of the congressional intent behind Section 409.

verb, not an adjective, thereby excluding the underlying data. See, *Claspill v. Missouri Pacific Railroad Company,* 793 S.W.2d 139, 140 (Mo. banc 1990) ("The plain language of section 409 provides that certain information shall not be admitted into evidence if it was compiled for the purpose of developing any highway safety construction improvement project which may be implemented utilizing federal-aid highway funds."); *Taylor v. St. Louis Southwestern Railway Company,* 746 F.Supp. 50, 54 (D. Kan. 1990) ("Given the clear mandate of Section 409, the court finds that any "reports, surveys, schedules, lists or data" pertaining to the evaluation of crossings, including the crossings at issue here, undertaken pursuant to the safety enhancement related purposes discussed in the statute are inadmissible.").

This trend of interpreting 23 U.S.C. 409 broadly to exclude information, not just documents, continued in federal courts after the 1991 amendment. The Seventh Circuit in *Harrison v. Burlington Northern Railroad Company,* 965 F.2d 155, 160 (7th Cir. 1992) citing the Eighth Circuit's decision in *Robertson v. Union Pacific Railroad Company* , 954 F.2d 1453, 1435 (8th Cir. 1992), excluded both a report and a letter based on Section 409. The court also prevented testimony on the contents of both documents based also on Section 409. Although the Court did not specifically say so, the Seventh Circuit must have regarded the statute as protecting information, not just documents, because a letter is not a report, survey, schedule, list, or compilation. Moreover, since the Seventh Circuit relied on the Eighth Circuit's decision in *Robertson* to hold that witnesses could not testify as to the contents of a letter and a report, the Seventh Circuit must have agreed with the Eighth Circuit's reasoning.

In *Robertson,* the Eighth Circuit excluded a newspaper article which contained an automobile count and the formula used for evaluating crossings because it was data

"compiled and utilized by the AHD [Arkansas Highway Department] pursuant to 23 U.S.C. § 130(d). . . ." *Robertson*, 954 F.2d at 1435. The appellants in *Robertson* also argued that the automobile count and the formula "were admissible because such information was not collected or utilized solely for federal funding projects. . . ." *Id.* at fn. 3. The court found the argument without merit and stated "[a]lthough such information was available for other uses and purposes, the statute's mandatory language requires exclusion of such evidence at trial. 23 U.S.C. § 409." *Id.*[9]

In addition to federal district and circuit courts, state appellate courts and courts of last resort uniformly interpreted 23 U.S.C. 409 to exclude informaion if it was collected pursuant to 23 U.S.C. §§ 30, 144, or 152. See, *Wright v. Norfolk and Western Railway Company*, 427 S.E.2d 724, 730-731 (Va. 1993); 245 Va. 160, 172 (Va. 1993) ("On the notice question, the plaintiffs sought to present data collected pursuant to a federal grade crossing program. Federal law specifically precludes use of such data in state and federal courts."); *Sawyer v. Illinois Central Gulf Railroad Company*, 606 So.2d 1069, 1074 (Miss. 1992) citing *Bearden v. Southern Railway Co.*, No. CV88-PT-0005-5 (N.D. Ala. July 11, 1988) (unpublished opinion) ("the plain language of the statute precludes data related to railroad-highway crossings from being admitted or considered for other purposes . . . [which precludes] the possibility that such information would be discoverable and admissible in civil suits."); *Perkins v. Ohio Department of Transportation*, 584 N.E. 2d 794, 802 (Ohio App. 10th Dist. 1989) (Plaintiffs prohibited from introducing "evidence of any accidents"

---

[9] In *Lusby v. Union Pacific Railroad*, 4 F.3d 629, 641 (8th Cir. 1993), the Eighth Circuit held that an expert could not rely on data, like a vehicle count and train count, made by AHTD (Arkansas State Highway and Transportation Department) because of 23 U.S.C. Section 409.

that defendant became aware of pursuant to Section 152, Title 23, U.S. Code).[10]

Though faced with numerous cases, the Louisiana Supreme Court, in *Wiedeman v. Dixie Electric Membership Corporation et al,* 627 So.2d 170, 173 (La. 1993); *cert. denied,* —— U.S. ——, 114 S.Ct. 2134, 128 L.Ed. 2d 864 (1994), held that traffic flow studies, traffic counts, accident reports and other reports and evaluations concerning the accident site were not excluded by 23 U.S.C. 409.[11] The court, using the same construction of the statute as did the Louisiana First Circuit Court in *Martinolich, supra,* stated:

> DOTD argues for an even more expansive interpretation that would protect data and raw facts as well as the written documents incorporating the data. DOTD essentially asks this court to transform a statute, which by its literal wording protects information compiled for certain purposes, into one which protects all information in DOTD's possession. *We refuse.* The word "compiled" indicates that information is collected into one document or composed from

---

[10] *Hagerty v. Southern Railway Company,* 133 F.R.D. 34, 36 (E.D. Mo. 1990), found that Section 409 created no privilege and evidence was discoverable although inadmissable. Both the 1991 amendment to Section 409 and *Robertson,* cited *supra,* have overruled *Hagerty.*

[11] The Louisiana Code of Evidence Article 803(b)(1) makes accident reports inadmissible at trial without qualification. The official comment to this Article states that its purpose is "to exclude untrustworthy evidence. . . ." La. C.E. Art. 803. Comment (e). La. R.S. 32:398(H) provides that motor vehicle accident reports are confidential, shall be exempt from the provisions of the public records law and shall be made available only to parties to the accident, parents or guardians of a minor who is a party to the accident, the insurers of any party which is the subject of the report, or the succession representatives, or to a news-gathering organization that requests documents related to the accident. Appendix E, p. 43a. See also, *Desalvo v. State of Louisiana and the Department of Public Safety and Corrections,* 624 So.2d 897, 899 (La. 1993).

> other sources. . . . Section 409 creates a privilege for compilations enumerated in the statute, but the privilege does not extend to reports and data gathered for or incorporated into such compilations.
>
> In so holding we are mindful that Section 409 forms a part of a comprehensive federal plan to promote highway safety. See 23 U.S.C. Section 402. Little can be gleaned from the statute's sparse legislative history [see H. Conf. Rep. No. 100-27, reprinted in 1987 U.S. Code Cong. and Admin. News 66, 156-157], but one court has reasonably concluded that Section 409 was enacted "to facilitate candor in administrative evaluations of highway safety hazards." *Duncan v. Union Pacific Railroad Co.*, 790 P.2d 595, 597 (Utah App. 1990)." A rule which requires DOTD to divluge source data but not the end product fosters candor by shielding the state's self-critical evaluations and conclusions from outside scrutiny." [12]

Id.

Since the Louisiana Supreme Court did not refer to the congressional report issued in conjunction with the 1991 amendment, it may not have considered the specific concerns, policies, and the purpose behind Congress' amendment of 23 U.S.C. 409. Thus, the Louisiana Su-

---

[12] In *Duncan*, the Utah Appeals Court quoted the trial court statement that 23 U.S.C. 409 was enacted "to facilitate candor in administrative evaluations of highway safety hazards." However, the appellate court did not address Section 409 because the court found UDOT immune from liability stating, "[h]ighway maintenance and improvement are predominately fiscal matters. Every highway could probably be made safer by further expenditures, but we will not hold UDOT (and implicitly, the legislature) negligent for having to strike a difficult balance between the need for greater safety and the burden of funding improvements." *Duncan*, 790 P.2d at 601. This is the same balance that Congress was trying to assist states in achieving when enacting Chapter 4 of Title 23, see discussion, *supra* at pp. 8-11. DOTD also raised this argument in its Assignment of Error in the application writ of review to the Louisiana Supreme Court Appendix B, p. 23a.

preme Court's decision *Wiedeman* misinterpreted the Federal law. Likewise, the Arizona Supreme Court in *Southern Pacific v. Yarnell,* cited *supra,* apparently did not consider the amendment when it stated that applying Section 409 to exclude data and facts "would prevent the parties from proving claims that could otherwise have been proven had there been no safety enhancement project." *Id.* at 613, *citing CSX Transportation v. Easterwood,* 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993).[13]

The issue in *CSX Transportation* was whether the Federal Railroad Safety Act of 1970, as amended, preempted state tort claims. That is not the issue in this case, nor was it before the Arizona Supreme Court in *Southern Pacific.* In addition, DOTD is not arguing that Section 409 governs "spheres of responsibility" as the petitioners argued in *CSX Transportation. Id.* at 399. Unlike railroad cases, this case does not present circumstances where railroads are not providing information to state agencies, or where a private entity is being sued for its own decisions; here a public entity is being sued for decisions made by a public body according to congressional intent.

Significantly, many states, including Louisiana, have laws which grant governmental agencies governmental immunity for policy decisions.[14] In addition, it is appropriate that courts refrain from imposing liability on state agencies for failure to upgrade or improve particular roads because to do so clearly infringes on the legislature's power to appropriate funds for the projects that it determines most deserve them. See, *Duncan v. Union Pacific Railroad,* 790 P.2d 595, 601 (Utah App. 1990) cited in *Wiedeman* (the Utah court did not have to resolve the issue of the scope of Section 409 because the state was

---

[13] It is questionable whether a plaintiff would always be able to recover for failure to upgrade. See discussion, *infra* this page.

[14] See, La. R.S. 9:2798.1.

immune based on the policy decision made when "having to strike a difficult balance between the need for greater safety and the burden of funding improvements.").

Since Congress can pre-empt state laws, and Section 409 affirmatively indicates that Congress intended to effect State tort law through its evidentiary scheme, state judiciaries cannot and should not object to implementing the broad language which promotes the broad goals of the congressional act, while state legislatures simultaneously accept federal funds which are available to promote those goals. Since the Louisiana legislature has accepted Congress' terms by implementing the programs set out in Title II and other sections of the Act, Louisiana's judiciary must now apply Section 409 as it plainly reads and in the way it was intended by Congress.

D. The congressional goal of promoting state flexibility in allocating limited funds is undermined by court decisions like Louisiana's because they change a states' focus from performing those projects that it has evaluated and prioritized to performing those projects that courts have decided, in a vacuum, are deficient to avoid future costly judgments.

Congress did not intend to prevent only a states' self-critical evaluations from being used in a civil suit; 23 U.S.C. 409 and its history reflects that Congress is also concerned with the effect that civil suits have on the Congress and the State's goals, as set out in House Report No. 102-171(I), and that they intended to allow state and local officials "the flexibility to make crucial decisions on how their funds should be used." H.R.Rep. No. 171(I), 102nd Cong., —— Sess. ——, *reprinted in*, 1991 U.S. Cong. & Admin. News 1526, 1531. Congress intended to insure that "the states are provided with qualifiable data and use information on which to make the most efficient and cost-effective funding decisions." *Id.* at 1552. "The Committee intends for the management systems to be an integral part of the state planning proc-

ess resulting in both short-term projects and longer term strategies." *Id.* at 1553. Finally, with respect to safety, Congress intended "to place fewer burdens on state programming." *Id.* at 1561.

A major burden on state prioritization and performance of repair and construction projects has been civil suits. When a court determines that a particular bridge or road is defective because of the failure of a state agency to upgrade or repair it, that court is second-guessing the state agency or legislative determination that the costs outweigh the benefits of performing the upgrade of repair. Thus, Court are superimposing their own goals upon the state agencies, rather than allowing them to follow congressional mandates, guidelines, and goals. This undermines congressional intent. It fosters an atmosphere where states are more concerned with avoiding future tort liability, so only those bridges, roads, and railroad crossings that courts have decreed are in need of upgrade are repaired. Consequently, agencies must disregard Congress' goals of giving "our Nation an advantage in competing on world-wide economic basis" by encouraging the states "to develop the best highway, transit and highway safety solutions from the standpoint of national productivity, clean air, and energy efficient." H. Rep. No. 171(I), 102nd Cong., —— Sess. —— *reprinted in,* 1901 U.S. Code Cong. & Admin. News 1526, 1541 and 1530.[15] An example of this interpretation and effect can be seen from the appellate decision in the *Doucet* case itself.

On appeal, the First Circuit Court cited its previous unpublished opinion stating:

> The entire trial record in *Cousins v. State Department of Transportation and Development,* 8710117 and 8712018, 22nd Judicial District Court was introduced into evidence in this case. *Cousins* involved a

[15] "National productivity" can fairly be interpreted as economic efficiency.

> remarkably similar accident on the Highway 11 bridge. The accident occurred during wet weather conditions on the north draw of the bridge. In the 1990 appeal, we affirmed the trial courts holding that the DOTD had notice of hazardous conditions on the Highway 11 bridge. *Cousins v. State Department of Transportation,* 89-2066, 572 So.2d 1205 (La. App. 1st Cir. 1990) (unpublished).

Appendix A, p. 8a-9a.

In the *Cousins* case, the trial judge found that the bridge was defective based solely on the bridge inspection reports that rated the different aspects of the bridge and the bridge as a whole.

> The court also relies on three internal bridge reports, namely memoranda of District 0-2 for the years 1983, 1984, and 1985, in which the bridge was given the following ratings:
>
> 1983—rated a "3" overall;
> 1984—rated a "2" overall;
> 1985—rated a "2" overall.
>
> These items alone afforded the State of Louisiana more than adequate notice of the hazardous and often critical conditions then existing on the Highway 11 bridge. Therefore, the Court finds the area of that highway known as the North Draw of the Five Mile Bridge to have created a hazardous condition.

See Appendix G, p. 72a.

The evidence used in *Cousins* is no longer discoverable or admissible pursuant to 23 U.S.C. 409, even in Louisiana, because it is the state's own critical evaluation of the bridge. However, it is clear that the appellate court felt that DOTD was liable because DOTD failed to repair or upgrade the drawbridge in response to the same appellate court's *Cousins* decision. The court's remarks in footnote six in *Doucet* shows that it is using its own cost-benefit analysis to decide when upgrades should be made.

> Expert testimony indicates that it would cost only $256,000.00 to remove and replace the metal grate on Highway 11 bridge. The cost is insignificant when compared with other alternatives considered by the DOTD. One alternative is to construct a bridge parallel to the existing bridge then widen and rehabilitate the existing bridge. The estimated cost of this procedure is $60 million. Construction of two new bridges would exceed $80 million.
>
> Another alternative is to close the Highway 11 bridge and divert all traffic to the existing I-10 bridges. This would require the construction or modification of interchanges, the addition of lanes and widening of shoulders on I-10. The cost of this alternative is about $55 million.
>
> We are aware that the two DOTD alternatives are costly and require special funding as well as a considerable amount of time to complete. *However, in the interest of avoiding future costly judgments, the DOTD should consider replacting the metal grating while waiting for funding for the mose costly and permanent alternative.* (Emphasis added).

Appendix A, p. 9a.

No state has the funds to upgrade every road and bridge that is deficient. Moreover, it was this very fact that compelled Congress to extensively modify Title 23.

> After all of the progress that has been made over the past two centuries in building an infrastructure that has been the envy of the world, that infrastructure is crumbling.
>
> Despite our long history of accomplishments in road-building, more than 60% of the miles of paved highways in the United States need some form of surface rehabilitation. According to the Department of Transportation, some 265,000 miles of highways were in poor condition in 1989, and about half of the Nation's total highway miles were at or near the point

> at which vehicle operations would be impaired by deteriorating conditions.
>
> Thirty-five percent of the Interstate System will have outlived its useful life in 1995, and the cost of maintaining the system could exceed the initial $120.5 billion of construction.
>
> Currently, 39% of the Nation's bridges are rated deficient, including one out of every four of the 270,000 Federal-aid Interstate, primary, secondary and urban bridges that carry 85% of the Nation's traffic.

H.Rep. No. 171(I), 102nd Cong., —— Sess. ——, *reprinted in* 1991 U.S. Code Cong. & Admin. News 1526, 1528.

In light of the serious deterioration of our national transportation system, Congress took two years to examine the needs of those systems and determined that "one of the most important things this legislation can do is give state and local officials the flexibility to make the crucial decisions on how their funds should be used." *Id.* at 1531. Therefore, among other things, Congress removed its artificial constraints of funding categories and prohibited reports, surveys, lists, schedules and data collected pursuant to the safety programs from being introduced at trial. H.Rep. No. 171(I), 102nd Cong., —— Sess. ——, *reprinted in,* 1991 U.S. Code Cong. & Admin. News 1526, 1531.

Even the Louisiana Supreme Court has recognized that "[i]t would be physically and financially impossible to bring all of the state's roads up to modern standards." *Mancuso v. Populus,* 530 So.2d 548, 550 (La. 1988). Since funds are limited, the state somehow must decide how to effectively use these funds. Congress has used its spending power to encourage states to use a priority system which consists of comparing all the roads and bridges

in the state and prioritizing them in accordance with a cost-benefit analysis of each location, section, and element. See, 23 U.S.C. 152(a) & (c).

Louisiana has opted to follow Congress' programs by enacting R.S. 48:190 set seq, entitled "State Highway System." Specifically, R.S. 48:228 through 48:234 implement the priority system. That priority system is based upon the following:

> Each year, beginning with the fiscal year commencing in 1975, the department shall submit to the legislature a program of construction to be commenced in the ensuing fiscal year, which shall be based upon the anticipated revenues to be appropriated by the legislature and listed in an order of priority of projects for each of the four classifications. The order of priorities shall be based upon the following illustrative but not exclusive list of factors which shall be considered: alignment of existing roads; the width of the rights-of-way; the costs of construction; the type and volume of traffic; the condition of structures and drainage; the accident rate; and the geographical distribution of the roadways to be constructed or reconstructed.

La. R.S. 48:229.

After studying each of the needs of the highways in the state, and estimating the present day costs of bringing the various highways up to current standards, which is required by La. R.S. 48:228, DOTD is required to prioritize the order of projects based on costs, accident rates, and other factors that would identify the benefits of performing the projects in comparison to all other roads in the state. This evaluation of roads, for the purposes of upgrade projects, is best left to those Congress intended: the Louisiana Legislature and DOTD, the agency with the expertise in highway construction, design, maintenance, and safety.

Since evaluations and priorities are not set in a vacuum, but with full knowledge and awareness of the needs of

every other road existing in the state, individual courts do not have the benefit, the time, the resources, or the expertise to perform these administrative and legislative evaluations. In addition, decisions of this type infringe upon the function and duties of the administrative agency and legislative decisions especially when the decisions suggest that the appellate courts will continue to impose "costly judgments," like the seven million ($7,000,000.00) dollar liability imposed in this case. They are second-guessing the decisions made by the Congress and the state legislature, through DOTD. This exacerbates the problem Congress sought to alleviate when considering the "more than $48 billion in injury costs every year." H. Rep. 171 (I), 102nd Cong., —— Sess. ——, *reprinted in,* 1991 U.S. Code Cong. & Admin. News 1526, 1561. These injury costs are quantified mainly by law suits. Thus, allowing appellate courts to second-guess these agencies by permitting them to review the same information used by these agencies only increases those costs and thwarts Congress' efforts to achieve a transportation system that can help our Nation compete in a world-wide economy.

Finally, Section 409 should be applied broadly, as exhibited by Congress intent and the words it chose to use; especially in light of the recent addition of the words "or collected." Any other reading would make the protection to state agencies illusory. Therefore, all information collected should not be discoverable or admissible in a court proceeding "or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, lists, or data." 23 U.S.C. Section 409.

II. THE 1995 AMENDMENT TO 23 U.S.C. 409 SHOULD BE RETROACTIVELY APPLIED BECAUSE IT IS MERELY A CLARIFICATION OF WHAT CONGRESS ALWAYS INTENDED OR IN THE ALTERNATIVE, DOES NOT RESULT IN MANIFEST INJUSTICE.

There is little question that Section 409 explictly preempts state evidentiary law by virtue of the Supremacy Clause. U.S. Const. Art. VI, C1.2; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604, 613 (1977).[16] The only remaining issue is whether 23 U.S.C. 409, as amended by P.L. 104-59, should be applied prospectively or retroactively.

From the history of the jurisprudence and resulting changes to the statute in the past, it is clear the insertion of "or collected" does not represent a change in the law; it is merely a clarification of what Congress always intended. However, assuming that the amendment does represent a change in the law, it should be retroactively applied.

A change in federal procedural law applies retroactively, absent contrary legislative mandate or manifest injustice. *Bradley v. School Board of Richmond*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476, 488 (1974). There is no provision in Section 409 or in Title II which indicates Congress meant the change to apply prospectively only. Therefore, the only question is whether manifest injustice results if this amendment is applied in this case. Whether manifest injustice occurs centers upon "(a) the nature and identity of the parties, (b) the nature of their rights; and the nature of the impact of the change in law upon those rights." *Id.*

Manifest injustice does not occur by applying the amendment to this case. This is an ordinary private tort

---

[16] See, *Beecher v. Keel*, 607 So.2d 549 (La. 1992); *Claspill v. Missouri Pacific Railroad Company*, 793 S.W.2d 139, 140 (Mo. banc 1990), *Sawyer v. Illinois Central Gulf Railroad Company*, 606 So.2d 1069, 1074 (Miss. 1992).

suit, even though the state has been made a party. The only right that the Doucets or Defendants have in this case is to present their case within the rules of evidence and have a judge determine, according to the state's substantive law, whether or not Defendants are liable to Plaintiffs for the injuries they sustained. At trial, the Doucets attempted to present evidence that Congress had mandated is not admissible. DOTD objected and the trial judge sustained the objection. The Doucets are not entitled to recover from anyone. They bear the burden of proving their claim. Therefore, it is insignificant that the exclusion of this evidence would, in effect, reinstate the trial court judge's opinion.

In addition, the Doucets had the opportunity to present ample evidence and did in fact present admissible evidence not governed by Section 409. Based upon that evidence, they could have shown that they were entitled to recover but the facts did not support their case. They presented evidence concerning the facts of the accident, the physical characteristics of the bridge, the testimony of their experts, and public complaint records in an attempt to prove the bridge had a physical defect which caused this accident. However, the trial judge determined that it was physically impossible for the accident to have happened the way the Doucets said it did, or no cause-in-fact; this is not manifestly injust.[17] Appendix D, p. 34a. Therefore, this amendment should be applied retroactively and the trial court's decision should be reinstated.

---

[17] In *Theriot v. Lasseigne*, 640 So.2d 1305 (La. 1994), the Louisiana Supreme Court stated:

> Under either theory [of strict liability or negligence], the duty owed is the same and finding of cause-in-fact is essential to the assessment of liability. Cause-in-fact is usually a "but for" inquiry which tests whether or not the injury would have occurred "but for" the defendant's substandard conduct. A finding of no cause-in-fact ends the inquiry into liability. (Citations omitted).

Theriot, 640 So.2d at 1310.

CONCLUSION

Congress intended to exclude and has clearly stated in 1991 and again in 1995 that information collected pursuant to 23 U.S.C. §§ 130, 144, and 152 are not admissable in civil trials. The First Circuit Court of Appeals did not apply the exclusion set out in Section 409. Therefore, they improperly considered and admitted evidence on appeal. The result is a liability imposed on the state that reaches seven million dollars. This Honorable Court should grant this petition and overturn the First Circuit Court of Louisiana's decision.

Wherefore, defendant/relator prays that this Honorable Court exercise its supervisory jurisdiction and grant this petition for Writ of Certiorari, reverse the decision of the Louisiana First Circuit Court of Appeals decision, and dismiss Plaintiffs' suit against defendant/relator at Plaintiff's costs.

The petition for a writ of certiorari should be granted.

Respectfully submited,

RICHARD P. IEYOUB
Attorney General
STEPHEN J. CAIRE *
Special Assistant Attorney General
ANDREE MATHERNE CULLENS
Attorney at Law
VEZINA AND ASSOCIATES
401 Weyer St., P.O. Box 461
Gretna, Louisiana 70054
(504) 368-5223
Attorneys for Petitioner

* Counsel of Record

APPENDICES

APPENDICES

APPENDIX A

COURT OF APPEAL OF LOUISIANA
FIRST CIRCUIT

No. 94 CA 1631

PAUL DOUCET, RUSSELL DOUCET and MICHAEL DOUCET

v.

HERBERT J. CHAMPAGNE, JR., ABC INSURANCE COMPANY and STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

April 7, 1995

Opinion Granting Rehearing in Part June 21, 1995

Before LOTTINGER, C.J., and SHORTESS and CARTER, JJ.

LOTTINGER, Chief Judge.

This action arises out of an automobile accident which occurred in February of 1992, on the U.S. Highway 11 bridge spanning Lake Pontchartrain from Slidell to New Orleans. Following trial on the merits, the trial judge assigned 0% fault to the Department of Transportation and Development (DOTD) and 100% fault to defendant, Herbert Champagne, Jr. From this judgment, the plaintiffs and Champagne appeal.

FACTS

Defendant, Champagne, was traveling north on the Highway 11 drawbridge in a heavy downpour. As he approached the metal grating on the north draw, his vehicle veered into the oncoming traffic where it struck a pickup truck owned and operated by Paul Doucet. Mr. Doucet's two sons, Russell and Michael, were passengers in the truck. The Doucets filed suit against Champagne for negligence in crossing lanes and against the DOTD for failing to properly maintain, inspect and/or take remedial action in the face of notice of a high incidence of accidents on the bridge. Champagne filed a cross-claim against the DOTD.

At trial, the Doucets attempted to prove, through expert testimony, that the condition of the bridge caused the accident. The DOTD presented conflicting expert testimony proving that no element of the bridge, in whole or in part, caused the accident. Following trial, the trial judge stated in his reasons for judgment that, "[t]his case must be decided on the testimony and the credibility afforded the expert witnesses. I find the basis for the conclusions reached by the State's experts to be sound technically and well grounded in common sense." The trial judge concluded that whatever deficiencies the bridge may have had, these deficiencies were not the cause-in-fact of the accident. The trial judge then concluded that Champagne's negligence was the sole cause of the accident. From this judgment, the Doucets and Champagne appeal. Their assignments of error raise the following issues for review: whether the trial judge erred in: (1) accepting the DOTD's experts' testimony; (2) excluding materials pursuant to 23 U.S.C. Sec. 409; (3) concluding that Champagne was inattentive; and (4) assessing damages.

EXPERT TESTIMONY AND APPLICATION OF 23 U.S.C. Sec. 409

At trial, the DOTD and the Doucets each presented expert witnesses to support their contentions. The Doucets' experts concluded that the defective condition of the bridge caused Champagne's vehicle to veer into the oncoming lane. The conditions noted by these experts included missing sections of the metal grate, uneven leaves of the metal draw,[1] worn metal grating,[2] a low coefficient of friction, and rutted and patchy asphalt which allowed standing water.

On the other hand, the DOTD's experts concluded that there was no condition of the bridge, either in isolation or in combination, which caused the accident. These experts contended that the coefficient of friction on the bridge was not significantly low, that the metal surface was not worn smooth and that there was no misalignment of the draw.

To support their experts' testimony, the Doucets attempted to introduce into evidence individual accident reports, bridge tender reports, damage reports, complaint records and DOTD's computerized "accident locator data" to show that the DOTD had knowledge of the hazardous conditions of the bridge. The trial judge excluded this evidence and accepted the opinions of the DOTD experts, who attributed the cause of the accident solely to driver error. Accordingly, the trial judge found that the condition of the bridge was not a cause in fact of the accident and that the sole cause of the accident was the negligence of Champagne.

---

[1] According to these experts, when the metal draw is closed there is a difference in height in the two leaves.

[2] These experts contend that the projections which were originally on the metal grating to assist with traction have practically worn off causing a smoother surface.

The Doucets contend that evidence was erroneously excluded and had the trial judge examined the excluded evidence, he may have reconsidered the explanations offered by the DOTD experts. According to the Doucets, the excluded evidence proves that the high number of accidents occurring on the bridge, particularly in wet weather, gave the DOTD notice of the dangerous situation which should have been corrected.

Generally, where the testimony of expert witnesses differ, it is the respnosibility of the trier of fact to determine which evidence is the most credible. *Sistler v. Liberty Mutual Insurance Company,* 558 So.2d 1106, 1111 (La. 1990). Credibility determinations are subject to the strictest deference and the manifest error-clearly wrong standard demands great deference for the trier of fact's findings. *Lirette v. State Farm Insurance Company,* 563 So.2d 850, 582 (La.1990); *Rosell v. ESCO,* 549 So.2d 840, 844-45 (La.1989). Where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Stobart v. State, Department of Transportation and Development,* 617 So.2d 880, 883 (La.1993).

However, when factual findings are tainted by a trial judge's erroneous exclusion of evidence, the verdict is not entitled to the appellate court's deference under a clearly wrong or manifestly erroneous standard. *Buckbee v. United Gas Pipe Line Company, Inc.,* 561 So.2d 76, 86 (La.1990). When prejudicial error has been committed in excluding evidence, the verdict must be set aside and, under the authority granted in *Louisiana Constitution Art. V, Sec. 10(B),* the appellate court must make an independent review of the record and decide the case on the merits, giving no weight to the factfinder's conclusions. *Id.* at 86-87. Error is prejudicial when it consists of the exclusion of evidence related to a material point in issue and adversely affects the substantial rights of the party opposed to the exclusion. *Id.* at 85.

In the present case, the trial judge excluded the evidence pursuant to 23 U.S.C. Sec. 409, which provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

The Louisiana Supreme Court addressed the application of section 409 in *Wiedeman v. Dixie Electric Membership Corporation,* 93-1314, 93-1318, 93-1352 (La. 11/29/93); 627 So.2d 170, *cert. denied,* —— U.S. ——, 114 S.Ct. 2134, 128 L.Ed.2d 864 (1994). The court noted that section 409 protects documents involving actual construction propects as well as documents compiled pursuant to sections 130, 144 and 152 of title 23. Id. at 172. The court went on to discuss the exclusions under sections 130, 144 and 152:

> 23 U.S.C. Sec. 130 requires that participating states "conduct a survey of all highways" to identify hazardous railroad crossings, and "establish and implement a schedule" of corrective projects. 23 U.S.C. Sec. 144 requires that states "make application to the Secretary for assistance in replacing or rehabilitating . . . highway bridge[s]" which are eligible for aid under a priority system established in cooperation with the Secretary.

> Section 152, relative to highway improvements, requires that participating states "maintain an engineering *survey* . . . assign *priorities* . . . and implement a *schedule* of projects." It mandates "an evaluation process . . . which shall develop *cost-benefit data.*" Finally, states must "*report* to the Secretary of Transportation" on an annual basis. 23 U.S.C. Sec. 152 (emphasis added). Section 409 incorporates Sec. 152 (by reference) and protects the compiled documents from use in civil trials. *Beecher* [*v. Keel*], 607 So.2d at 549 [(La. 1992)]. Thus, in addition to determining whether an item of evidence was compiled "for the purpose of developing any highway safety improvement project," the trial court must decide whether the item is one of those enumerated in Sec. 152.
>
> *Id.* at 172-73.

The court then stated that "[s]ection 409 creates a privilege for compilations enumerated in the statute, but the privilege does not extend to reports and data gathered for or incorporated into such compilations." *Id.* at 173. Accordingly, the court concluded that accident reports, traffic counts and other raw data collected by the DOTD were discoverable and admissible. But, surveys to identify and improve hazardous railroad crossings, applications for federal assistance in replacing or rehabilitating bridges, studies assigning priorities and scheduling improvements, and other compilations made for developing highway safety projects which utilize federal funds were excluded under section 409. *Id.*

Applying *Wiedeman* to the present case, we conclude that the trial judge erred in excluding some of the evidence. According to *Wiedeman,* the individual accident reports,[3] bridge tenders' reports, damage reports and com-

---

[3] Although the trial transcript indicates that the Doucets proffered individual accident reports from 1990 and 1991, we were unable to locate these reports in the record. However, the DOTD

plaint records were admissible. However, the DOTD's computerized "accident locator data" which compiles accident data milepost by milepost, was properly excluded because this data was developed for use in highway safety projects.

The excluded evidence may have significantly influenced the trial judge's conclusions regarding the cause of the accident. Because the excluded evidence relates to a central issue which adversely affects the substantial rights of the Doucets, we must disregard the trial judge's verdict and review the record de novo. *Buckbee,* 561 So.2d at 85.

In conducting our review of the record, we considered the expert testimony as well as the improperly excluded evidence. The individual accident reports from 1982 to 1989 indicate that of the accidents occurring on the metal grate, over 75% occurred in wet weather.[4] This high incidence of wet weather accidents supports the theories offered by the Doucet experts rather than the DOTD experts.

Another essential document excluded by the trial judge, was a May 13, 1986 letter from bridge tender Alex Kinchen. This letter was contained in the excluded damage reports and complaint records. In the handwritten letter, Kinchen states that, "Evertime [sic] it raines [sic] someone is spinning around on the bridge northbound usually they keep going." This letter supports the Doucets' contention that the number of wet weather accidents on the grate is even higher than the number in-

---

did proffer an enlarged spread sheet which gives information on accidents from 1982 to 1989. Two DOTD experts prepared this exhibit for trial by reviewing individual accident reports. Because the spread sheet was prepared using individual accident reports and was not compiled under section 409, the spread sheet should have been included as evidence.

[4] This percentage was verified by the DOTD expert who studied the individual accident reports.

dicated in the individual accident reports. A third document, also contained in the excluded damage reports and complaint records, is a May 11, 1992 inventory of steel grate compiled by Dennis Burke, a DOTD district bridge maintenance engineer. The inventory reflects the various types of unused steel grate available in Burke's district. On May 14, 1992, Burke made the following notation on the inventory sheet, "this is the pattern [of metal grate] on N & S draw @ U.S. 11. FAPP [for all practical purposes] projections are gone." The note refers to the 5/16 inch projections which protrude slightly above the plane of the metal sheet. The notation clearly supports the contention of the Doucet experts who stated that the metal grate on the Highway 11 bridge was worn smooth. On the other hand, the note directly contradicts statements made by the DOTD experts. One DOTD expert stated that the "traction lugs" still existed on the grate. Although a second expert stated that there was some "polishing" of the grid, he later suggested that the projection points never existed and, therefore, could not be missing. By admission of DOTD's own maintenance engineer, the projection points had existed but were worn smooth.

These documents, which were not considered by the trial judge, directly contradict the testimony and conclusions of the DOTD experts. The excluded evidence supports the Doucets' contention that the worn metal grating, which becomes especially slick during wet weather, caused Champagne's vehicle to "track" into the oncoming lane.

For these reasons, we find that the DOTD had notice of the defective condition of the bridge [6] and that it failed

---

[6] The entire trial court record in *Cousins v. State, Department of Transportation and Development*, 8710117 and 8712018, 22nd Judicial District Court, was introduced into evidence in this case. *Cousins* involved a remarkably similar accident on the Highway 11 bridge. The accident occurred during wet weather conditions on the north draw of the bridge. In the 1990 appeal, we affirmed the

to make the necessary repairs to correct the defect.[6] Furthermore, we conclude that the defective condition of the bridge was a cause-in-fact of the accident.

FAULT OF CHAMPAGNE

In attributing the sole cause of the accident to Champagne, the trial judge accepted the DOTD's experts' opinions that the bridge was not defective and that the accident could only be caused by Champagne's inattention. Because we have determined that the trial judge erred in accepting the opinions of the DOTD experts, we now review the judge's conclusions regarding Champagne's negligence.[7]

Champagne testified that it was raining at the time of the accident and that he had turned on his headlights,

---

trial court's holding that the DOTD had notice of the hazardous conditions on the Highway 11 bridge. *Cousins v. State, Department of Transportation*, 89-2066, 572 So.2d 1205 (La.App. 1st Cir. 1990) (unpublished).

[6] Expert testimony indicates that it would cost only $256,000.00 to remove and replace the metal grate on the Highway 11 bridge. This cost is insignificant when compared with other alternatives considered by the DOTD. One alternative is to construct a bridge parallel to the existing bridge, then widen and rehabilitate the existing bridge. The estimated cost of this procedure is $60 million. Construction of two new bridges would exceed $80 million.

> Another alternative is to close the Highway 11 bridge and divert all traffic to the existing I-10 bridges. This would require the construction or modification of interchanges, the addition of lanes and widening of shoulders on I-10. The cost of this alternative is about $55 million.
>
> We are aware that the two DOTD alternatives are costly and require special funding as well as a considerable amount of time to complete. However, in the interest of avoiding future costly judgments, the DOTD should consider replacing the metal grating while waiting for funding for the more costly and permanent alternatives.

[7] The trial judge assigned 0% fault to Paul Doucet. This portion of the judgment has not been appealed.

wipers and defogger. He stated that he was traveling 35 mph, the advisory speed posted by the DOTD on the bridge. He stated that when he hit the north draws his vehicle began "tracking" into the oncoming lane. He attempted to steer back into his lane but the vehicle did not respond. Champagne further stated that as a weekend race car driver, he has experienced numerous spins, skids and slides on the race track but, with quick reaction, he can get his race car back in control. He stated, however, that what he experienced on the bridge was not a sliding sensation but was a "tracking" which caused the car to go directly into the oncoming lane.

Albert Smith, the state trooper who investigated the accident stated that "[at] the time of the accident the roadway was wet, which made the grid itself very slippery, which I think had a major factor in the accident itself." He estimated that at the time of the accident the vehicles were traveling at 45 mph.

The DOTD experts testified that the condition of the bridge was not a cause of the accident and, therefore, the most "probable cause" of the accident was the inattention of Champagne. However, on cross-examination of Champagne, the DOTD did not direct any questions to Champagne's possible lack of attention. Furthermore, the DOTD did not submit any evidence which points to Champagne's driving in an inattentive or reckless manner.[8] Upon concluding that the bridge was not defective, the experts merely attributed the cause of the accident to Champagne's inattentiveness.

Contrary to the assertions of the DOTD experts, we have concluded that the condition of the bridge was a cause in fact of the accident. Because there is no evidence that Champagne was in fact driving in an inattentive or reckless manner, we cannot agree that he was a

[8] Although there is a 10 mph discrepancy in Champagne's and the state trooper's testimony, the DOTD experts did not suggest that Champagne's speed was a cause of the accident.

cause of the accident. According to his testimony, he was traveling at the advisory speed, with headlights, wipers and defogger on, when his vehicle suddenly began tracking into the oncoming lane. All attempts to correct this tracking failed. In light of Champagne's testimony, the testimony of the Doucet experts and the documentary evidence, we conclude that the sole cause of the accident was the defective condition of the bridge.

For the forgoing reasons, we reverse that portion of the judgment attributing the sole cause of the accident to Champagne. We conclude that the sole cause of the accident was the defective condition of the Highway 11 bridge.

DAMAGES

Finally, the Doucets assert that the trial judge erred in assessing low general damage awards. In *Ambrose v. New Orleans Police Department Ambulance Service*, 93-3099, 93-3110, 93-3112 (La. 7/5/94); 639 So.2d 216, the Louisiana Supreme Court addressed the proper standard of appellate review for factual findings. The court first cited its prior opinion in *Arceneaux v. Domingue*, 365 So.2d 1330 (La. 1978), wherein it stated that the court of appeal should not upset the factual findings of a trial court absent manifest error or unless clearly wrong. A proper review, therefore, cannot be "completed by reading so much of the record as will reveal a reasonable factual basis for the finding in the trial court; there must be a further determination that the record established that the finding is not clearly wrong." *Id.* at 1333.

The *Ambrose* court then noted that the principle set down in *Arceneaux* was perpetuated in *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257 (La.1993) and *Stobart v. State, Department of Transportation and Development*, 617 So.2d 880 (La.1993). In *Youn*, a case involving the review of damages, the supreme court stated that "the discretion vested in the trier of fact is 'great,' and even vast." *Youn*, 623 So.2d at 1261. In *Stobart*, the Su-

preme court stated that a "court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of 'manifest error' or unless it is 'clearly wrong,' " and "where two permissible views of the evidence exists, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong." *Stobart*, 617 So.2d at 882-83.

After citing *Youn* and *Stobart*, the *Ambrose* court stated that:

> Notwithstanding the Court's earlier guidance to reviewing courts in *Stobart v. State, Through DOTD*, 617 So.2d 880 (La.1993), it was not our purpose in that case to mandate that the trial court's factual determinations cannot ever, or hardly ever, be upset. Although deference to the factfinder should be accorded, the court of appeal, and the Louisiana Supreme Court, nonetheless have a constitutional duty to review facts. Of course, the reviewing court may not merely decide if it would have found the facts of the case differenty. Rather, notwithstanding the belief that they might have decided it differently, the court of appeal should affirm the trial court where the latter's judgment is not clearly wrong or manifestly erroneous. Because the court of appeal has a constitutional function to perform, it has every right to determine whether the trial court verdict was clearly wrong based on the evidence, or clearly without evidentiary support.

Ambrose, 639 So.2d at 221. (Footnotes omitted.)

Following the mandate of the supreme court, we have thoroughly reviewed the facts in this case and have determined that the trial judge was not clearly wrong or manifestly erroneous in granting damages for past and future pain, suffering and mental anguish,[9] negligent in-

---

[9] **The Doucet's challenged the trial judge's awards of $300,000.00 to Paul Doucet and $1,500,000.00 to Russell Doucet for damages for past and future pain, suffering and mental anguish.**

fliction of emotional distress [10] or loss of consortium.[11]

With regard to the awards for loss of earning capacity, the appellate record does not contain the economic testimony referred to in plaintiff's brief, therefore, we cannot say that the trial court erred in granting these awards. *Willis v. Letulle,* 597 So.2d 456, 475 (La.App. 1st Cir. 1992); *Adams v. State, Department of Transportation and Development,* 464 So.2d 1003, 1004 (La.App. 1st Cir.1985).

The Doucets also challenge the trial judge's awards for future medical expenses for Paul and Russell. While the record does support an award for future medical expenses for Paul, there is no evidence in the record on appeal establishing the cost of future treatment. However, the record does contain Paul's past medical bills for which he was awarded $44,532.30. These past medical bills may be used to conclude what award for future medical expenses would be supported by the record. *Brinson v. Morgan City Housing Authority,* 629 So.2d 1214, 1218 (La.App. 1st Cir.1993), *writ denied,* 635 So.2d 1134 (La.1994). Based on the past medical records, we find that the trial judge's award of $30,000.00 for future medical expenses for Paul Doucet was reasonable.

---

[10] Paul, Michael and Russell Doucet were each awarded $15,000.00 for negligent infliction of emotional distress.

[11] The Doucets assert that the trial judge erred in failing to grant a loss of consortium award to Michael, Russell and Paul. We note, however, that the petition did not assert a loss of consortium claim on behalf of Michael or Russell. While the petition did assert a loss of consortium claim on behalf of Paul, we find that, based on the evidence in the record, the trial judge did not abuse his vast discretion in failing to grant a loss of consortium award to Paul. We find no error in the trial judge's award of $25,000.00 for loss of consortium in favor of Debra Doucet.

The appellate record does contain evidence of future medical expenses for Russell.[12] The estimated expenses included costs for one time future medical expenses as well as costs for ongoing medical evaluations, treatments, attendant care and equipment. The one time medical expenses alone were estimated at $151,327.00. The combined costs for ongoing medical evaluations, treatments, attendant care and equipment was estimated at over $2,570,614.00.[13] In awarding Russell only $150,000.00 in future medical expenses, the trial judge apparently failed to consider the estimated costs for ongoing medical evaluations, treatments, care and equipment. We find that the trial judge abused his discretion in granting this award. We conclude that $2,000,000.00 for future medical costs for Russell Doucet is the lowest reasonable amount supported by the record.

CONCLUSION

For the foregoing reasons, we reverse that portion of the judgment asigning sole fault to Herbert Champagne and assign sole fault to the DOTD. We amend the judgment to award Russell Doucet $2,000,000.00 for future medical expenses. All other damage awards are affirmed. Costs of this appeal are assessed against the DOTD in the amount of *$3,500.00*.

REVERSED IN PART, AMENDED AND AFFIRMED IN PART.

SHORTESS, J., concurs with reasons.

---

[12] In the accident, 60% of Russell Doucet's spinal cord was severed, rendering him an incomplete paraplegic.

[13] Dr. Robert Voogt, testified that Russell would initially require eight hours a day attendant care and that later in life he would require sixteen hours a day. He stated that Russell's life expectancy is 52.1 more years. Because Dr. Voogt did not state when the sixteen hour a day care would begin, the quoted estimate is based on eight hours a day attendant care for 52.1 years.

SHORTESS, Judge, concurring.

I do not agree with the majority holding which permits the DOTD spread sheet into evidence (page 96, footnote 3) because DOTD did not appeal and the exclusion of its evidence was not assigned as error; however, in view of all the other evidence in this record, the majority's error is harmless because the spread sheet was cumulative.

I respectfully concur.

ON APPLICATION FOR REHEARING

PER CURIAM.

In our original opinion, we reversed that portion of the trial court's opinion which assigned 100% fault to Herbert J. Champagne, Jr. We concluded that due to the defective condition of the Highway 11 bridge, the DOTD was solely responsible for the accident. On application for rehearing, Mr. Champagne contends that because we determined that he was 0% at fault, he was entitled to damages for the injuries which he suffered as a result of the defective condition of the bridge.

On re-checking the record, we note that Mr. Champagne raised two assignments of error in his appellate brief.[1] While he asserted that the trial court erred in finding the state free from negligence, he did not allege that the trial court erred in failing to grant him damages. Matters neither assigned as error nor argued, or, matters assigned as error but not argued may be considered abandoned. *See* Uniform Rules—Court of Appeal 2-12.4; *American Motorist Insurance Company v. American Rent-All, Inc.*, 617 So.2d 944, 947 (La. App. 5th Cir. 1993); *Churchill Farms, Inc. v. Louisiana Tax Commission*, 249 So.2d 594, 602 (La.App. 4th Cir.), *affirmed*, 249 So.2d 923, 259 La. 321 (1971). Because this issue was not raised by Mr. Champagne in his original appeal, we will not now consider it on rehearing.

The Doucets also applied for a rehearing on several damage issues. They contend that Russell, Paul and Mi-

---

[1] Champagne's assignments of error were:

1. The trial court erred in finding the state of Louisiana free from negligence based on evidence not supported by trial testimony.

2. The trial court further erred in considering expert testimony on behalf of the defendant to determine whether Herbert Champagne was "inattentive" when there was no testimony on that issue.

chael should be awarded damages for the loss of enjoyment of life and that their awards for loss of earning capacity should be increased. The Doucets also contend that the awards for Paul and Michael's future medical expenses should be increased.

In their appellate brief the Doucets did not address the trial court's failure to award damages for loss of enjoyment of life. Furthermore, in brief the Doucets specifically stated that they did not dispute Michael's award for future medical expenses. Again, we decline to consider on rehearing these issues which were not raised or argued in the original appeal. Id. On appeal, the Doucets did raise the isue of loss of earning capacity. In our original opinion we were unable to say that the trial court erred in granting awards for loss of earning capacity because the record did not contain the relevant economic testimony. In their motion for rehearing, the Doucets note that economist, Dr. Melville Wolfson, was scheduled to testify at trial but, due to a death in his family, his appearance was deferred and his testimony was taken by deposition after trial. The Doucets further note that although the deposition was excluded from the appellate record, it was made available to the trial judge before making his decision.

With the addition of Dr. Wolfson's deposition to the record, we have the economic testimony necessary to review the trial judge's awards for loss of earning capacity. We review these awards in light of the standard of review articulated in our original opinion.

The record clearly supports an award for loss of earning capacity. Upon considering the record, the testimony of Dr. Wolfson and the trial judge's awards for past lost wages, we conclude that the trial judge abused his discretion in granting Paul and Michael's awards for loss of earning capacity.

The trial judge awarded Paul $74,107.00 in past lost wages. This award represents approximately one and one-half years of lost wages. Although Paul has a remaining work expectancy of twenty-three years, the trial judge awarded only $50,000.00 for loss of earning capacity. The lowest award supported by the economic testimony was $110,246.00.

The trial judge awarded Michael $13,612.00 for his one and one-half years of past lost wages. Although Michael has a work expectancy of forty-seven years, the trial judge awarded only $100,000.00 for loss of earning capacity. The lowest award supported by the economic testimony was $261,449.00.

Considering the facts, the economic testimony and the enormous discrepancy in the trial judge's awards for past lost wages and loss of earning capacity, we find that the trial judge abused his discretion in granting Paul and Michael's awards for loss of earning capacity. We conclude that awards of $110,246.00 for Paul and $261,449.00 for Michael are the lowest reasonable amount supported by the record.

In considering the evidence as it relates to Russell, we conclude that the trial judge did not abuse his discretion in granting Russell $230,000.00 for loss of earning capacity. The lowest possible award supported by the economic testimony was $227,422.00. Considering all the evidence, we cannot say the trial judge abused his discretion in granting this award.

The only issue remaining on rehearing is the adequacy of the trial judge's award for Paul's future medical treatment. In our original opinion we used past medical expenses to support the trial judge's award for Paul's future medical expenses. Although Dr. Wolfson's deposition gives an estimate for Paul's future medical expenses we again affirm the trial judge's award. The trial judge was

free to conclude, based on the medical testimony, what future treatment Paul requires. Based on the medical evidence in the record, we cannot say that the trial judge was clearly wrong or manifestly erroneous in granting damages for Paul's future medical expenses.

For the forgoing reasons, a rehearing is granted for the purpose of amending our original opinion to increase the award for Paul's loss of earning capacity to $110,246.00, to increase the award for Michael's loss of earning capacity to $261,449.00, to affirm the award for Russell's loss of earning capacity and to affirm the award for Paul's future medical expenses. In all other respects, the applications for rehearing applied for by all parties are denied.

REHEARING GRANTED IN PART AND DENIED IN PART.

APPENDIX B

THE SUPREME COURT
OF THE STATE OF LOUISIANA

No. 95-C-1759

PAUL DOUCET, RUSSELL DOUCET
AND MICHAEL DOUCET

VS.

HERBERT J. CHAMPAGNE, JR., ABC INSURANCE
COMPANY AND STATE OF LOUISIANA, THROUGH THE
DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

In RE: Transportation & Dev. Dept. of; —Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of St. Tammany 22nd Judicial District Court Div. "E" Number 92-11043; to the Court of Appeal, First Circuit, Number CA94 1631

November 3, 1995

Denied.

JCW
PFC
WFM
HTL
BJJ

KIMBALL, J. would grant the writ.

VICTORY, J. would grant the writ.

Supreme Court of Louisiana
November 3, 1995

/s/ Frans Labranch, Jr.
Clerk of Court
For the Court

APPENDIX C

IN THE SUPREME COURT
FOR THE STATE OF LOUISIANA

Civil Action No. 95-C-1759

PAUL DOUCET, RUSSELL DOUCET,
MICHAEL DOUCET, and
DEBRA DOUCET,
Respondents/Plaintiffs

Versus

HERBERT J. CHAMPAGNE, JR.,
ABC INSURANCE COMPANY AND STATE
OF LOUISIANA, DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT,
Relator/Defendants

CIVIL ACTION

APPLICATION BY STATE OF LOUISIANA,
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT

FOR WRITS OF CERTIORARI AND REVIEW
OF THE LOUISIANA COURT OF APPEAL,
FIRST CIRCUIT IN CASE NO. 94 CA 1631
LATELY PENDING THEREIN

Relator/Defendants

Respectfully submitted,

RICHARD P. IEYOUB
Attorney General

VEZINA AND ASSOCIATES
(A Professional Law Corporation)
401 Weyer Street, P.O. Box 461
Gretna, Louisiana 70054
(504) 368-5223

/s/ Stephen J. Caire
NEL F. VEZINA, T.A.
LA Bar No. 13058
STEPHEN J. CAIRE
LA Bar No. 3780
ANDREE MATHERNE CULLENS
LA Bar No. 23212
Special Assistant Attorney General
Attorneys for Relator/Defendant

* * * *

STATEMENT OF CONSIDERATIONS

1. The First Circuit Court of Appeal for the State of Louisiana exceded its Constitutional powers in violation of the Louisiana Constitution Article II, Section 2 when it decided that relator was liable for failure to replace the grate on the Highway 11 bridge.
2. The decision rendered by the First Circuit Court of Appeal for the State of Louisiana represents a gross departure from proper judicial proceedings and conflicts with decisions of this Honorable Court because that court rendered a decree that refers to and is based on information in an unpublished decision.
3. The decision rendered by the First Circuit Court of Appeal for the State of Louisiana conflicts with decisions of this Honorable Court in rendering a decree based upon expert evidence that was not developed through the scientific method.
4. The decision rendered by the First Circuit Court of Appeal for the State of Louisiana conflicts with decisions of this Honorable Court in holding that the defective conditions of the bridge was the sole cause of the accident.
5. The decisions rendered by the First Circuit Court of Appeal for the State of Louisiana should be reviewed because it involves a Federal question and is based upon precedent that should be modified to conform with the United States Congressional intent when enacting 23 U.S.C. Sec. 409 and with other state and federal appellate decisions on the same issue.
6. The decision rendered by the First Circuit Court of Appeal for the State of Louisiana should be reviewed because the trial court's decision was not clearly wrong and the Court of Appeals decision is clearly erroneous because it is based on its misapplication of the facts and evidence not properly in the appellate record before them.

* * * *

APPENDIX D

TWENTY-SECOND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

Number 92-11043 Division "E"

PAUL DOUCET, RUSSELL DOUCET,
and MICHAEL DOUCET

versus

HERBERT J. CHAMPAGNE, JR., ABC INSURANCE COMPANY
and STATE OF LOUISIANA THROUGH THE DEPARTMENT OF
TRANSPORTATION AND DEVELOPMENT

Filed: December 30, 1993

REASONS FOR JUDGMENT

On February 2, 1992, plaintiff Paul Doucet was driving his truck across the Lake Pontchartrain Bridge on Highway 11 on his way home from work. His two sons Russell and Michael were riding in the truck. They usually took Interstate 10 across Lake Ponchartrain, but on this night there was a wreck on the twin span section of Interstate 10; traffic was backed up, and the Doucets decided to take the alternate route.

On the same day Herbert Champagne, Jr., defendant and plaintiff in these consolidated suits, was coming from his work in New Orleans to his home in Slidell. He usually took Interstate 10 north to Slidell, but on this evening he, too, heard about the wreck on the Interstate and de-

cided to take the Highway 11 bridge north across Lake Pontchartrain. As he traveled north across the north draw bridge, he testified that the metal grating on the bridge kept pushing him left into the south bound lane, and that attempts to correct his steering back into his lane were to no avail. The gist of his description of the accident is that the bridge simply took control of his vehicle and propelled it into the south bound lane. He testified that he was traveling at 35 miles per hour, and that he does not recall ever applying his brakes.

The two vehicles crashed head-on into each other.

All occupants of both vehicles were severely injured.

Paul Doucet suffered severe damages to his face and head. His tongue was half severed, his nose was lacerated to the bone, the sinus was fractured, as was the orbit of the left eye. He additionally suffered lacerations and contusions to his face, skull, and leg. A deviated septum resulted from the accident, and he has been hospitalized repeatedly since the wreck to undergo treatment for the injuries he received. He suffers a residual slurred speech resulting from his half-severed tongue which limits his ability to communicate and has affected the tone and quality of his voice. The evidence establishes that he is suffering cognitive deficits which are secondary to the head trauma suffered in the wreck. He has suffered depression as a result of these injuries, and his inability to support his family as he did before the wreck. In addition to continuing medical treatment, Mr. Doucet is in need of rehabilitation services and training. Additionally, he was conscious much of the time after the accident and before he was taken to the hospital, and he saw the injuries to his two sons. Seeing his children hurt and not being able to help them has had a traumatic psychological effect on Mr. Doucet.

Michael Doucet was seventeen years old and had completed the eighth grade on the date of this accident. He

was transported by ambulance to Slidell Memorial Hospital and then transferred to West Jefferson Hospital. He was diagnosed as suffering fracture of the L-1 vertebrae and contusions of the ankle and elbow. He was later seen by Dr. Lococo who found a chipped fracture of the end place of the anterior portion of the body of the L-4 and compression fractures at L-2 and L-4. He suggested that if the symptoms continue, a fusion of L-1 and L-2 would be indicated. Michael Doucet had a motor cycle wreck prior to the accident in question. His back was hurt in that accident. However, there is no evidence that the current injuries are related to the motor cycle accident.

Michael was riding in the middle of the truck seat, between his father and his brother, when his father alerted his sons to an impending tragedy. It was only a few seconds between the time of the warning and the impact. However, since the accident, Michael has seen his family deteriorate as a result of the injuries, he, his brother, and his father suffered as a result of the wreck on the Highway 11 bridge.

Michael Doucet testified that his back hurts and sometimes he feels that legs will not support him. However, he is waiting to see if the pain goes away before he submits to surgery. He also testified that he played football and baseball prior to the accident but has not played since.

Michael Doucet was not employed prior to the accident and has not been employed since.

Michael had incurred medical expenses in the amount of $13,612.59 as of the date of the trial.

Russell Doucet was riding next to the passenger door of his father's truck at the time of the wreck. He suffered the most serious injuries of all the people involved. He was twenty years old at the time, and despite his injuries, remained conscious from the time of the accident

until he reached the hospital. He was not only aware that he was injured but he saw his father and his brother in the wreck and lying in the highway being treated by paramedics.

Russell could not feel his legs. He was removed from the wreckage, placed on a backboard and transported to Northshore Regional Medical Center. He was admitted and diagnosed with a burst fracture of the lumbar spine with spinal canal impingement, along with multiple trauma. A CAT scan indicated a burst fracture of the vertebral body of L-4 with "marked retropulsion of numerous body fracture fragments through the entirety of the spinal canal." After the examination and diagnoses, Dr. Burt Bratton, the attending physician at Northshore Regional Medical Center, had Russell transferred to Tulane Medical Center for an examination by Dr. Kzung Dinh, a spinal cord injury specialist.

Dr. Dinh confirmed Bratton's diagnosis. Subsequently, Dr. Dinh supervised surgery on Russell's back at Charity Hospital. Russell underwent an open reduction and internal fixation which consisted of surgery on the back and insertion of metal parts and screws in order to pull the L-4 vertebral body forward out of the spinal canal. Thus, restoring as much function as possible.

Russell was transferred to the Louisiana Rehabilitation Center for rehabilitation treatment. Dr. Saucier, who was in charge of Russell's rehabilitation at this facility, stated that the occupational therapy administered to Russell was necessary to teach him how to operate inside his home; that is, to learn to conduct simple daily activities of bathing, preparing his meals, and how to get around in his home, as a first step to living outside the rehabilitation unit. When he left the rehabilitation unit, Russell was able to walk with a walker, but needed constant supervision. Dr. Saucier opined that Russell had not yet reached the goal of being a community ambulater.

During his stay at the rehabilitation unit, Russell suffered recurring pain in his buttocks and pain that was a burning sensation in his legs from time to time. Dr. Saucier stated that these symptoms are common with spinal cord injuries.

Russell was discharged to go home, but was subsequently admitted to the Gulf States Rehabilitation Unit. Dr. Kishner was responsible for his care at this facility, and says that Russell was suffering from the cauda equina syndrome. He describes this as one of the most severely painful conditions. One who suffers from this syndrome is so hypersensitive that the simple touching of the leg causes severe pain. Dr. Kishner diagnosed Russell as suffering severe pain as a result of the L-4 fracture, cauda equina injury, paraplegia, and sexual impotence.

Russell continues to wear leg braces in order to be mobile. These braces must be replaced about every three years. He suffers from his feet swelling and must wear support hose. The metal appliances in Russell's back are permanent and will possibly fail during Russell's lifetime. If this happens, surgery will be necessary to repair or replace the metal parts.

Dr. Kishner opines that Russell reached maximum medical recovery in June 1993. Russell has reached the status of an independent householder ambulator with the aid of braces, canes, and a walker. However, it is unlikely that Russell will ever become an independent community ambulator. This means that he must use a wheelchair when he leaves the house. He was in a wheelchair during the trial of this matter. With aging process, the prognosis is that Russell's condition will worsen with the onset of arthritis and osteoporosis in the lower extremities.

Russell still suffers from sexual impotency. He has undergone treatment for this condition and will continue to seek treatment seeking to restore his sexual functions which ceased as a result of injuries suffered in this wreck.

Robert Voogt, an expert in rehabilitation counseling, testified that Russell will need wheelchair maintenance, reclining lift chair, shower chair, neuromuscular stimulator, replacement pads, conductivity gels, grab bars, toilet armrests, and a bath safety bench.

There is no doubt that this young man was severely and permanently injured and has suffered permanent and disabling injuries as a result of this wreck. He will need continuing medical care, special equipment, and physical assistance for the rest of his life.

Mrs. Debra Doucet, Paul's wife and Michael and Russell's mother, has filed a claim for loss of corsortium. Mrs. Doucet had undergone back surgery prior to the time her family was involved in this accident and was still in the rehabilitative stages from that surgery. When she got the call that her family had been in a wreck, she went to Slidell Memorial Hospital to find her husband and one son. The other son was at Northshore Regional Medical Center. She suffered the trauma of seeing her entire family severely injured and hospitalized. She has seen her husband and the father of her children loose his ability to communicate successfully, inability to concentrate, and to calculate sufficiently to run his business. She has had to take a more active role in the family business.

She has seen her oldest son Russell become a paraplegic and has had to assume additional responsibilities for his care. The testimony revealed a family that has developed into a bundle of nerves since this automobile wreck. Mrs. Doucet has had to assume the role as major care taker of a family that under normal circumstances would have no longer been her every day responsibility.

LIABILITY

All four Doucets have sued the State of Louisiana through the Department of Transportation and Development (DOTD) alleging that the State was negligent un-

der the provisions of Louisiana Civil Code Article 2315 and also alleging that the State is strictly liable for the condition of the road under the provisions of Louisiana Civil Code Article 2317. The Doucets have also sued Herbert Champagne, Jr., alleging that he was negligent in the operation of his vehicle and that his negligence was a cause-in-fact of their injuries.

Under Article 2315, plaintiffs bear the burden of proving that the State owed a duty to protect them from the harm they encountered, that the State breached its duty, that the State's breach of duty was the cause-in-fact of plaintiffs' injuries, and that plaintiff' sustained damages as a result of the State's breach of its duty.

Plaintiffs introduced into evidence the record, including the judgment of the First Circuit Court of Appeal, of *Herbert Bush* v. *State of Louisiana,* No. 89 CA 2066. In that matter, the trial court had ruled that the Highway 11 bridge, where this accident occurred, was defective and that the State was 85% at fault in causing harm to the plaintiff in that suit. That decision was affirmed by the appellate court. Plaintiffs established that defects in the bridge complained of in *Bush* v. *State of Louisiana* had not been repaired at the time of the wreck which is the subject of this lawsuit. The *Bush* decision was not designated for publication and carries no precedential value.

Plaintiffs' expert witnesses included Mr. Boyd Gauthreaux, a retired DOTD engineer, who testified that he experienced a tracking sensation when he crossed the north draw of the Highway 11 bridge. Plaintiffs also called Mr. Raymond C. Burkhart, Jr., a certified accident reconstructionist, and Dr. Franklin Griffith, a physicist and accident reconstructionist. These two experts had calculated the coefficient of friction on the Highway 11 bridge. Dr. Griffith testified that the coefficient of friction on this bridge was far below the standard of safety set by the American Society for Testing and Materials

(ASTM), particularly those standards set out in ASTM Standard Technical Publication 793.

Plaintiffs called Mr. James R. Clary, a consulting civil engineer and land surveyor. Mr. Clary was accepted as an expert in highway design and safety. He testified that the Highway 11 bridge is defective because the north draw does not meet the national standards for bridges and grids, and further that the bridge is not properly inspected and maintained by DOTD. Mr. Clary cited the specifications for highway bridges adopted by the American Association of State Highway Officials 1949 and the Maintenance Plan Manual developed by DOTD. He found that in the maintenance of this bridge, DOTD fell below the standards set forth by either publication.

All plaintiffs' experts are of the opinion that the bridge is defective and that it should be closed or repaired to meet the required safety standards.

DOTD presented the testimony of four expert witneses: Dr. Christopher G. Shapley, Larry D. Petersen, Dr. Jack B. Humphreys, and Dr. Olin K. Dart, Jr.

Dr. Christopher Shapley qualified as an expert in automotive engineering with specialties in tire mechanics and traction, steering and suspension mechanics, vehicle braking systems analysis and simulation of dynamic systems, and automobile and semi-trailer truck dynamics. He presented a series of mathematical calculations to the Court which in effect showed that it would take more than 1200 pounds of force to move Champagne's vehicle out of its lane of travel and into the on-coming traffic. Plaintiffs did not present sufficient evidence to show that this force was applied outside the steering of Mr. Champagne. Dr. Shapley attacked the method of calculation done by plaintiffs' expert Dr. Griffith, and asserted that the numbers presented by plaintiffs were manipulated by plaintiffs' expert to show a defect in the bridge. Shapley opined that manipulation of the numbers by plaintiffs' expert were

improper and the result was unsupported by the proper application of the information. He testified that no condition of the bridge in isolation or combined with other factors caused the accident. The cause was Champagne's inattention up to point of impact.

Plaintiffs' expert, Dr. Griffith, was in court during Shapley's testimony. However, there was no rebuttal testimony to challenge or disprove Shapley's conclusions.

Larry Peterson, who qualified as an expert in accident reconstruction and automotive engineering, testified that he used a G-Analyst test on the Highway 11 bridge to test for slipperiness, tracking, and friction. Several tests were done in simulated conditions of rainy weather. Water was hosed onto the bridge surface before each test. Mr. Petersen purchased a 1977 Ford Maverick similar to the vehicle Mr. Champagne was driving on the day of this wreck. He had the automobile in good operating order and used that vehicle to conduct the test. He attempted, as much as possible, to recreate the conditions present at the time of the wreck.

Petersen found in tests where his speed exceeded 40 miles per hour, that he was able to control his vehicle. The only occasion when Peterson experienced some rotation was when he intentionally did a two wheel lock. This locking of two wheels did cause some rotation on the bridge, but it did not cause his vehicle to go into the oncoming lane of traffic.

Dr. Dart, Dr. Humphreys and Dr. Shapley observed the test. After a review of the data compiled by plaintiffs' experts and the tests he conducted, Mr. Petersen concluded that the condition of the bridge in no way contributed to Champagne's loss of control or the accident.

Dr. Humphreys, a civil engineering emeritus from the University of Tennessee, an expert in traffic engineering and accident reconstruction, testified that he, Shapley and

Dart looked for defects in the Highway 11 bridge, outside forces, or whatever else could have caused the wreck, but that they could not find the cause related to the condition of the bridge. He testified that during the skid tests on the bridge, Petersen put the car through its paces and that the coefficient of friction results achieved by the tests are reasonably acceptable. He further testified that the skid resistance of the pavement and grid section on the bridge are not so low as to cause a hazardous condition. He found that the differential of friction from the pavement to the grid varied from 35 to 40 and from 34 to 41. He found that this difference should not make a difference to a motorist.

Dr. Humphreys found that some transverse steel bars are missing from the steel grate of the bridge. He opined that these bars are secondary. He found that no load bearing longitudinal steel bars were missing from the grate. He found that there was no differential between the north and the south sections of the leaves of the draw bridge under normal conditions. The only time there was a differential in the leaves was when these experts had the bridge tender deliberately cause a differential for the purposes of the tests being conducted. During these tests no traffic was allowed on the bridge.

Dr. Humphreys concluded that he knew of no physical properties of the bridge that could have caused loss of control of the Champagne vehicle. He does not think that the bridge had anything to do with the loss of control of the vehicle.

Mr. Olin Dart testified that he thinks Mr. Champagne made a significant move which caused this wreck. He found no physical property of the bridge that would cause this accident.

This case must be decided on the testimony and the credibility afforded the expert witnesses. Both sides produced experts to support their respective contentions. I

find the basis for the conclusions reached by the State's experts to be sound technically and well grounded in common sense. Under the circumstances existing on February 2, 1992, the Champagne vehicle travelling at 35 miles per hour simply would not have done what he said it did. I, therefore, accept the conclusions of the State's experts as the truth.

DOTD proved by a preponderance of the evidence that whatever deficiencies the Highway 11 bridge may have, these deficiencies were not the cause-in-fact of the automobile wreck under consideration in this matter. The cause of the wreck was the sole negligence of defendant-plaintiff Herbert Champagne, Jr. I find the driver Paul Doucet, Sr., free from fault.

Mr. Champagne was operating his vehicle in the rain. He was inattentive and drove into the lane of oncoming traffic. One whose vehicle is in the wrong lane of traffic at the time of collision bears the burden of proving that the collision was not caused by his negligence, or that there were justifiable circumstances which would excuse his conduct. The driver whose automobile was in the wrong lane of traffic at the time of a head-on collision with another vehicle has the burden of proving that he was not negligent in being in the wrong lane of traffic.

Mr. Champagne failed to prove that he was not negligent by being in the wrong lane of traffic at the time of the head-on collision with Doucet's vehicle.

Doucet named Champagne as a defendant, but all the evidence produced at trial by plaintiffs was directed toward proving that DOTD was negligent in the maintenance of the Highway 11 bridge and that the bridge was faulty to the point of causing the collision. Therefore, plaintiff sought to prove that the State was strictly liable for the condition of the bridge, that the State was on notice of the defects in the bridge because of the judgment atainst it in the *Bush* v. *State of Louisiana* matter. They further sought to prove that DOTD after

being on notice of the defective bridge, failed to make the repairs to correct the defect or in the alternative to close the bridge.

I find that the Doucets did not carry their burden of proof against DOTD. Judging from all the expert testimony, I find that the condition of the bridge was not the cause-in-fact of the wreck on February 2, 1992.

SUIT BY HERBERT CHAMPAGNE

Herbert Champagne was the driver of the automobile which was headed north on the Highway 11 bridge, when he left his lane of travel and crashed into the Champagne vehicle. He filed a suit against the State of Louisiana through the Department of Transportation and Development alleging that the bridge was defective, and because of that defect, it caused his vehicle to track and slide out of the northbound lane into the on-coming traffic. He alleges that he could do nothing to bring the vehicle under control and keep it in the proper lane of travel. Champagne alleges that but for the defective nature of the bridge and the negligence of DOTD in the maintenance of the bridge, the wreck would not have happened.

Champagne was injured in the wreck. He suffered a comminuted intra articular fracture of the distal radius and ulnar styloid of the left wrist. He also suffered severe lacerations to both knees, along with numerous contusions and abrasions.

Because I find that Mr. Champagne's negligence was the sole cause of this wreck, his suit is dismissed with prejudice. He shall bear all costs in his case.

DAMAGES AWARDED IN FAVOR OF THE DOUCETS AGAINST HERBERT J. CHAMPAGNE, JR.

I award Paul Doucet the following:

Past and future pain, suffering and mental anguish	$300,000.00
Past medical expenses	$ 44,532.30
Future medical expenses	$ 30,000.00
Loss of past income	$ 74,107.00
Disability	$ 50,000.00
Loss of earning capacity	$ 50,000.00
Trauma from seeing his sons injured	$ 15,000.00

I award Michael Doucet the following:

Past and future pain, suffering and mental anguish	$150,000.00
Past medical expenses	$ 13,612.59
Future medical expenses	$ 80,000.00
Loss of earning capacity	$100,000.00
Trauma from from seeing his father and brother injured	$ 15,000.00

I award Russell Doucet the following:

Past and future pain, suffering and mental anguish	$1,500,000.00
Past medical expenses	$ 57,759.27
Future medical expenses	$ 150,000.00
Loss of past income	$ 21,580.00
Disability	$ 500,000.00
Loss of earning capacity	$ 230,000.00
Trauma from seeing his father and brother injured	$ 15,000.00

I award Debra Doucet the following:

Loss of consortium	$25,000.00

Herbert Champagne, Jr., is cast for all costs of these proceedings.

Doucets' suit against the State of Louisiana through the Department of Transportation and Development is dismissed with prejudice.

I will sign a judgment in compliance with these reasons when it is presented.

Covington, Louisiana, this 29th day of December, 1993.

/s/ M. Clayton James
M. CLAYTON JAMES
District Judge

APPENDIX E

STATUTORY PROVISIONS

UNITED STATES CODE ANNOTATED
TITLE 23. HIGHWAYS
CHAPTER 1—FEDERAL-AID HIGHWAYS

Sec. 152. Hazard elimination program

(a) Each State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

(b) The Secretary may approve as a project under this section any highway safety improvement project.

(c) Funds authorized to carry out this section shall be available for expenditure on any public road (other than a highway on the Interstate System).

(d) The Federal share payable on account of any project under this section shall be 90 percent of the cost thereof.

(e) Funds authorized to be appropriated to carry out this section shall be apportioned to the States as provided in section 402(c) of this title. Such funds shall be available for obligation in the same manner and to the same extent as if such funds were apportioned under section 104(b)(1), except that the Secretary is authorized to waive provisions he deems inconsistent with the purposes of this section.

(f) Each State shall establish an evaluation process approved by the Secretary, to analyze and assess results achieved by highway safety improvement projects carried

out in accordance with procedures and criteria established by this section. Such evaluation process shall develop cost-benefit data for various types of corrections and treatments which shall be used in setting priorities for highway safety improvement projects.

(g) Each State shall report to the Secretary of Transportation not later than December 30 of each year, on the progress being made to implement highway safety improvement projects for hazard elimination and the effectiveness of such improvements. Each State report shall contain an assessment of the cost of, and safety benefits derived from, the various means and methods used to mitigate or eliminate hazards and the previous and subsequent accident experience at these locations. The Secretary of Transportation shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives not later than April 1 of each year on the progress being made by the States in implementing the hazard elimination program (including but not limited to any projects for pavement marking). The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, means and methods used, and the previous and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (a) and include recommendations for future implementation of the hazard elimination program.

(h) For the purposes of this section the term "State" shall have the meaning given it in section 401 of this title.

UNITED STATES CODE ANNOTATED
TITLE 23. HIGHWAYS
CHAPTER 4—HIGHWAY SAFETY

Sec. 402. Highway safety programs

(a) Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform guidelines promulgated by the Secretary. Such uniform guidelines shall be expressed in terms of performance criteria. In addition, such uniform guidelines shall include programs (1) to reduce injuries and deaths resulting from motor vehicles being driven in excess of posted speed limits, (2) to encourage the proper use of occupant protection devices (including the use of safety belts and child restraint systems) by occupants of motor vehicles and to increase public awareness of the benefit of motor vehicles equipped with airbags, (3) to reduce deaths and injuries resulting from persons driving motor vehicles while impaired by alcohol or a controlled substance, (4) to reduce deaths and injuries resulting from accidents involving motor vehicles and motorcycles, (5) to reduce injuries and deaths resulting from accidents involving school buses, and (6) to improve law enforcement services in motor vehicle accident prevention, traffic supervision, and post-accident procedures. If the Secretary does not designate as priority programs those programs described in the preceding sentence, the Secretary shall submit to Congress a report describing the reasons for not prioritizing such programs. The Secretary shall establish a highway safety program for the collection and reporting of data on traffic-related deaths and injuries by the States. Under such program, the States shall collect and report such data as the Secretary may require. The purposes of the program are to ensure national uniform data on such deaths and injuries and to allow the Secretary to make determinations for use in developing pro-

grams to reduce such deaths and injuries and making recommendations to Congress concerning legislation necessary to implement such programs. The program shall include information obtained by the Secretary under section 4007 of the Intermodal Surface Transportation Efficiency Act of 1991 and provide for annual reports to the Secretary on the efforts being made by the States in reducing deaths and injuries occurring at highway construction sites and the effectiveness and results of such efforts. The Secretary shall establish minimum reporting criteria for the program. Such criteria shall include, but not be limited to, criteria on deaths and injuries resulting from police pursuits, school bus accidents, and speeding, on traffic-related deaths and injuries at highway construction sites and on the configuration of commercial motor vehicles involved in motor vehicle accidents. Such uniform guidelines shall be promulgated by the Secretary so as to improve driver performance (including, but not limited to, driver education, driver testing to determine proficiency to operate motor vehicles, driver examinations (both physical and mental) and driver licensing) and to improve pedestrian performance and bicycle safety. In addition such uniform guidelines shall include, but not be limited to, provisions for an effective record system of accidents (including injuries and deaths resulting therefrom), accident investigations to determine the probable causes of accidents, injuries, and deaths, vehicle registration, operation, and inspection, highway design and maintenance (including lighting, markings, and surface treatment), traffic control, vehicle codes and laws, surveillance of traffic for detection and correction of high or potentially high accident locations, and emergency services. Such guidelines as are applicable to State highway safety programs shall, to the extent determined appropriate by the Secretary, be applicable to federally administered areas where a Federal department or agency controls the highways or supervises traffic operations.

* * * *

(k)(1) Subject to the provisions of this subsection, the Secretary shall make a grant to any State which includes, as part of its highway safety program under section 402 of this title, the use of a comprehensive computerized safety recordkeeping system designed to correlate data regarding traffic accidents, drivers, motor vehicles, and roadways. Any such grant may only be used by such State to establish and maintain a comprehensive computerized traffic safety recordkeeping system or to obtain and operate components to support highway safety priority programs identified by the Secretary under this section. Notwithstanding any other provision of law, if a report, list, schedule, or survey is prepared by or for a State or political subdivision thereof under this subsection, such report, list, schedule, or survey shall not be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report, list, schedule, or survey.

* * * *

Sec. 409. Discovery and admission as evidence of certain reports and surveys

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

LOUISIANA REVISED STATUTES
TITLE 32. MOTOR VEHICLES AND TRAFFIC REGULATION
CHAPTER 1. LOUISIANA HIGHWAY REGULATORY ACT
PART VII. PROCEDURE AND REPORTS

Sec. 398. Accident reports; when and to whom made; information aid; fees for copies; fees for accident photographs

* * * *

D. It shall be the duty of the state police or the sheriff's office to investigate all accidents required to be reported by this Section when the accident occurs outside the corporate limits of a city or town; and, it shall be the duty of the police department of each city or town to investigate all accidents required to be reported by this Section when the accidents occur within the corporate limits of the city or town. Every law enforcement officer who investigates an accident, as required by this Subsection, shall instruct the driver of each vehicle involved in the accident to report the following to all parties suffering injury or property damage as an apparent result of the accident:

(1) The name and address of the owner and the driver of the vehicle.

(2) The license number of the vehicle.

(3) The name of the liability carrier for the vehicle, and whether the investigation is made at the scene of the accident or by subsequent investigation and interviews; and shall, within forty-eight hours after completing the investigation, forward a written report of the accident to the Department of Public Safety if the accident occurred outside the corporate limits of a city or town, or to the police department of the city or town if the accident occurred within the corporate limits of such city or town. Police departments shall forward such reports to the De-

partment of Public Safety within six days of the date of the accident.

(4) The state police, any local police department, or any sheriff's office shall provide copies of accident reports to any interested person upon request and may charge a fee, not to exceed the sum of five dollars per report that does not exceed two pages, and seven dollars and fifty cents per report that exceeds two pages.

(5) The state police, any local police department, or any sheriff's office shall provide copies of photographs of accidents, or other photographs required of the investigating agency to any interested person upon request and may charge a reasonable fee adopted pursuant to R.S. 49:950, et seq., for copies of photographs actually received.

E. Every person holding the office of coroner in this state, or, in the event of a vacancy in the office,, the person performing the duties of coroner, shall report to the Department of Public Safety and to the Louisiana Highway Safety Commission the death of any person as a result of an accident involving a motor vehicle, and the circumstances of the accident within five days following such death. Such reports shall be made on forms supplied or approved by the Department of Public Safety as provided for in R.S. 32:398(F). Every hospital shall notify the coroner of the parish in which they are located of any death occurring in said hospital as a result of injuries sustained in a motor vehicle accident.

F. The Department of Public Safety shall prepare and shall, upon request, supply to police, coroners, sheriffs, and other suitable agencies or individuals, forms for accident reports, calling for sufficient detailed information to disclose, with reference to a highway accident, the cause, conditions then existing, and the persons and vehicles involved. All accident reports required by this Section shall be made on forms supplied or approved by the Department of Public Safety.

G. The Department of Public Safety shall receive accident reports required to be made by this Section and may tabulate and analyze such reports and publish annually, or at more frequent intervals, statistical information based thereon as to the number, cause, and location of highway accidents. Based upon its findings after analysis, the Department of Public Safety may conduct further necessary detailed research to determine more fully the cause and control of highway accidents. It may further conduct experimental field tests within areas in the state from time to time to prove the practicality of various ideas advanced in traffic control and accident prevention.

H. The reports required by this Section, and the information contained in the reports, shall be confidential, shall be exempt from the provisions of R.S. 44:1 et seq., and shall be made available only to the parties to the accident, parents or guardians of a minor who is a party to the accident, and insurers of any party which is the subject of the report, or to the succession representatives of those parties, or to the attorneys of the parties or succession representatives, or to a news-gathering organization that requests documents related to the accident. All persons and their agents are prohibited from screening accident reports if the person or his agent does not represent any of the persons involved in a particular accident, the report for which could reasonably be expected to be available. However, this limitation shall not prevent any person from requesting particular reports regardless of whether the person represents any party in the accident. The information in the reports may be tabulated and included in the statistical information published under the provisions of Subsection G of this Section. Nothing in this Section shall prohibit the sale of police accident reports or other driving record information to consumers of on-line driving records under written contract for purchase of records with the Department of Public Safety and Corrections. Further, the information in the reports may be used by the office of motor vehicles for the purpose of maintaining operating records.

APPENDIX F

TWENTY-SECOND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

No. 92-11043-1

PAUL DOUCET, ET AL.

versus

HERBERT J. CHAMPAGNE, JR.

TRANSCRIPT OF PROCEEDINGS taken before the Honorable A. Clayton James, Judge Presiding, Division E. Twenty-Second Judicial District Court, Parish of St. Tammany, State of Louisiana, on June 14, 1993, Covington, Louisiana.

* * * *

[17] MR. GARRETT: I think that is it, Your Honor. I believe Mr. Sanders wants to take some testimony on 409 and one preface to that, Your Honor. We got this stack pursuant to discovery requests of accident reports on [18] this bridge. And I had someone make up a sheet identifying each one of them by date and I took that over to Bridge City to make my inspection and lo and behold I find accident reports that have not been supplied to me. Now they did supply them after my inspection in Bridge City. I do have a copy of them now. I do not know if that is all of them or not. I suggest that his experts have had the benefit of the computer generated accident locator as well as the hard copies and I would like to have that benefit for my experts as well. I

think it will be clear when we take those experts that they have not spent the time and money to do what was already available to them by the State. I don't know why the State would cause them to go through that, but if the State has given them 409 materials, I do not see how they can now come forth and tell us they are not discoverable to us when they are available to them and they give them to out of office experts. So with that background I guess we should hear the 409.

THE COURT: Yes.

MR. SANDERS: I would call Don Marson to the stand, please.

(DONALD RAY MARSON, AFTER HAVING BEEN FIRST DULY SWORN UNDER OATH, DID TESTIFY AS FOLLOWS:)

DIRECT EXAMINATION BY MR. SANDERS:

Q. Could you state your full name and business address for the record, please?

A. Donld Ray Marson. Business address is Louisiana Department of Transportation and Development, 8900 C Street. That is like in cat. That is Baton Rouge, Louisiana. The zip [19] code, I am not really sure of.

Q. Are you employed with the Department of Transportation and Development?

A. That is correct, yes, sir.

Q. In what capacity are you employed by the Department?

A. I am a traffic and planning superintendent in charge of gathering accident data for the Department.

Q. Could you tell the Court briefly what your duties entail?

A. The federal government requires the Department to maintain an accident file in order to receive certain safety moneys. We get our accident data from the Department of Public Safety. The State statute that requires each individual investigating agency to send in a copy of the hard copy of the reports to the Department of Public

Safety. They compile this data on a computer bank and once every six months we obtain a computer listing of accident data from the Department of Public Safety.

Q. So you actually get a taped transfer of information?

A. That is correct, yes, sir.

Q. That information is basically a computerized summary of the hard copies of the accident data that has been provided to the state police?

A. That is correct.

Q. From all investigative agencies?

A. Yes, sir. That is correct.

Q. The rest of your job is basically the manipulation of that data and provision of that data within the department?

A. Yes, sir. We furnish it to our department personnel there at their request for their various studies that they perform.

Q. How long have you been performing that function?

A. I have been in accident data collection now since 1972.

MR. SANDERS: Your Honor, may I approach the witness?

[20] THE COURT: Yes.

EXAMINATION BY MR. SANDERS:

Q. I want to show you a series of documents which I have marked as Exhibit A, in globo, and I ask you to review those and tell me if you can give me a brief summary of each document, please.

A. The first document is a letter sent to Edward C. C-O-G-I-N, representative from Neil Wagner. It is a letter stating that he is requesting the district administrator to review and investigate the condition of the bridge that he has written us about.

Q. What is the next document?

A. Next document is memorandum to Mr. Lacey Glascock from Mr. Thomas Ormond asking us to obtain

an accident evaluation report for the past ten years on this particular bridge.

Q. What is the next document, sir?

A. Next document is a memorandum to Mr. Louis Garrido, bridge design engineer, from Mr. Thomas Richardson, producing the accident data on US 11 Ponchartrain Bridge.

Q. Does it have any attachments to it?

A. Yes, sir. The first page of this attachment, I am not really familiar with it. It says structural inventory and appraisal.

Q. That's not a document that you produced?

A. No, sir. This did not come out of our office.

Q. What else is attached to that document?

A. Behind this is document of the accident data on US 11 from milepost 11.4 through 15.4 in St. Tammany Parish, a listing of accidents beginning at 1976. It is several pages. And then it runs through 1985.

Q. Is that a computer copy of the computer generated printout [21] from your office?

A. Computer printout that is generated off of our accident file.

Q. You could generate that data in a number of different formats. Is that correct?

A. Yes, sir. This particular printout here, we have a basic program that we provide, probably, about ninety-five precent of our people. The printout is generated, like I said, off a computer program. This is not the entire file. This is just what ninety-five percent of our people want and, because of limited space, we have picked out what ninety-five percent of them want and this is what we furnish them.

Q. This data could exist in the computer generated forms in a number of different formats.

A. In a number of, for instance, this is a complete listing of everything between these mileposts. If I wanted to look at rear end accidents, I could generate that off the computer.

Q. I understand. The document that you are referring to there. How is that document paid for?

A. This document?

Q. Uh-huh. (Affirmative response).

A. All of our funds are paid for by the federal government.

Q. What is the purpose of that document?

A. Of this particular government?

Q. Uh-huh. (Affirmative response).

A. Was furnished to Mr. Garrido on his request.

Q. For purpose of traffic safety studies?

A. Traffic safety studies, yes, sir.

Q. Is that the type of material that is recovered by 23:409?

A. That is correct, yes, sir.

MR. GARRETT: Objection. He is asking for legal opinion.

[22] THE COURT: He has answered already. Overruled. Proceed.

EXAMINATION BY MR. SANDERS:

Q Are there any computer generated reports that you produced that are not as a result of data you received from the Department of Public Safety pursuant to this federal program?

A. No, sir.

Q. Are there any other documents attached?

A. At the end of the accident listing there is another document, structure inventory and appraisal. Again, this document didn't come from our office so I can't really testify to it. There is another document, appears to be, excuse me, a Xerox copy of part of our Orleans Parish milepost map. This is a milepost map that the Department of Public Safety uses in spotting their accidents when they receive the hard copies.

Q. Okay.

A. They assign a route and milepost based on these maps.

Q. Is there anything else attached to that exhibit, sir?

A. No, sir. That is the last.

Q. That's not a copy of the memo at the bottom? Oh, I am sorry, that is the one I just—

A. There is a memo from Mr. Louis Garrido to Mr. Henry Barousse; looks like traffic consult and design inspection, with a breakdown of the accident data that was furnished to him on US 11 at those mileposts.

Q. Was the report from Mr. Garrido based on the data that was provided to him in the letter that you previously referred to?

MR. GARRETT: Objection, outside the scope of this witness's knowledge.

MR. SANDERS: [23] If he has knowledge, Your Honor.

THE COURT: If he has knowledge. You may answer if you know.

THE WITNESS: As far as I know, yes, sir.

EXAMINATION BY MR. SANDERS:

Q. Are all the documents you have indicated part of the normal business reports of the Department of Transportation and Development?

A. That is correct, yes, sir.

Q. Either in the Department on correspondence or on D.O.T.D. letterhead?

A. Letterhead, yes.

MR. SANDERS: I have no further questions of the witness.

CROSS EXAMINATION BY MR. GARRETT:

Q. Mr. Marson?

A. Yes.

Q. You mentioned that the—one of the reports the —I guess, it is an accident locator file?

A. The accident listings I have mentioned.

Q. Right. Would that be the same thing as an accident locator?

A. That is a listing compiled off our accident file, yes.

Q. You mentioned in your testimony that this was what ninety-five percent of the people in the Department of Transportation and Development, this information is what they wanted.

A. Yes, sir.

Q. What did they want it for?

A. They use these accident listings in their various safety studies.

[24] Q. And you would prepare that for them whether or not they were involved in a federal project or a—strictly a state project, correct?

A. Yes, sir.

Q. So that the preparation of this list has nothing particularly federal about it?

A. Well, that list is—

MR. SANDERS: Objection to the question's characterization, Your Honor. He has testified, I believe, that his office is federally funded.

MR. GARRETT: We are coming to that. We are coming to the funding agency, Your Honor.

THE COURT: Overrule the objection.

EXAMINATION BY MR. GARRETT:

Q. Basically, my question is, this list could have well been prepared for a state highway with no federal funding involved in its care or preparation?

A. It could have been produced for a state route that is not federally funded.

Q. Right, yes, sir. You do, in fact, produce similar lists for that purpose, for the Department, state wide?

A. Yes, sir.

Q. Okay. Without—I will come back to that. You also testified that you knew that all these, all this work—are you paid by the federal government?

A. That is correct, yes, sir.

Q. You mean your pay check actually comes from the US Department of Treasury?

A. No, the funds that pay my salary come from the US [25] government, yes, sir.

Q. How long would that have been true?

A. I have been eight-five percent federally funded since I entered the accident data section.

Q. Okay. Did you keep those records prior to that time?

A. Sir?

Q. Prior to the time you became eighty-five percent federally funded?

A. I have always been eighty-five percent federally funded. Our accident file has always been eighty-five percent federally funded, yes.

Q. That is since '72?

A. Even before that.

Q. Okay. Now I am going to draw your attention to the August 15, '88 memorandum signed by Louis Garrido which you testified was related to an accident locator chart that you had drawn. Is that—

A. Yes, sir.

Q. Does Mr. Garrido, does that memorandum contain anything other than references to the accident locator reports? I draw your attention particularly to the last two paragraphs of it? Do they make reference to an accident locator report in the last two paragraphs?

A. To the report itself?

Q. To the reports or to the accidents?

A. It looks like he has made a recommendation. He has made the recommendations, it looks like, in the last two paragraphs.

Q. What do those recommendations concern or what is the gist of the recommendations, or if you'd like to, just read the recommendations as he wrote them?

A. It says, "We wish to pursue another alternative which demands closing the existing US 11 bridge permanently and [26] diverting all traffic to existing I-10 bridges. The second alternative, with rough preliminary

costs estimate, is $55,000,000.00 which will require the construction of a new Northshore interchange or modification of the existing interchange, construction of additional travel lanes to existing I-10 bridges and modifications to the existing US 11 slash I-10 interchange on the south shore. Attached for your review and use are the quadrangle map area photo of the location in question with the request that your study of this matter provide us with recommendations for further development."

Q. That has nothing to do with the records your office keeps, does it?

A. No, not those two paragraphs.

Q. Okay.

MR. GARRETT: Just one moment, Your Honor. Also, there is one other thing which—there is a letter from Boyd Gautreaux you are seeking to eliminate.

MR. SANDERS: You have got copies of it.

MR. GARRETT: Well, I know that, but I mean it is listed in your motion.

MR. SANDERS: A letter from Boyd Gautreaux?

MR. GARRETT: Yes, June 28, 1990.

MR. SANDERS: It may not be in there. If it is, it is probably something that deals with that. The Louis Garrido memo.

MR. GARRETT: [27] Are you withdrawing that request to—

MR. SANDERS: If I don't have it attached to the exhibit that I just had, I guess I am going to simply have to—I was hoping there—

MR. GARRETT: Good. I don't think we have anything else, at this time, Your Honor.

THE COURT: Anything further of this witness?

MR. SANDERS: Not at this time, Your Honor.

THE COURT: You may step down, Mr. Marson.

MR. SANDERS: Your Honor, I would move to mark exhibit A, in globo.

MR. GARRETT: No objection.

THE COURT: Let it come in evidence.

* * * *

[626] [MR. SCHMIDT:] Q. Sir, do you recognize these as complaint records and bridge damage and highway traffic? Is that generated by your personnel? Do you recognize any signatures?

A. I recognize the signatures on the complaint records. Neither of which were generated by my personnel. The highway damage by highway traffic report was generated by one of my subordinate personnel. They are records kept by our department.

MR. SCHMIDT: Your Honor, at this time I would like these records—

MR. BARRETT: We would like, Your Honor, we have received numerous records from the State and we are offering them all in globo, just having Mr. Roth identify the type of record that they maintain.

MR. SANDERS: Your Honor, we are going to object to an in globo.

MR. GARRETT: They maintain records of complaints, reports of complaints, reports of bridge damage, and records of complaints. Three different items. There are one or two other sets of records we would like to introduce. Again these records are so voluminous that it would take us days just to go through them. I simply offer them at this time so that the analysis of them can be referred [627] to in the memorandum produced post trial and for that purpose. I am not trying to ask the Court to go through these, but I assume if I make any misrepresentation as to what the records contain that the State will have the opportunity to correct me and if they make any misrepresentations I trust I will have the opportunity to correct them. For that reason I think it would expedite this trial if we simply identify them and allow the records to be filed, and if any verification is needed it can be done when representations are made as to what the records reflect. Obviously our purpose is to show that there are complaints about this bridge. That there are complaints about this grid. That they have received complaints that they know about them. They

even have records of the damaging going on in the bridge. That is the purpose of which it is offered.

MR. SANDERS: Your Honor, if the only purpose of the records is to show knowledge or something to that effect, I think this Court can make that determination without a review of all those records. There is plenty of evidence that has already been submitted before this Court as to that issue. It is trying to prove the liability of the Department for this specific accident and I say these records have absolutely no relevance to the hearing whatsoever and that throws us back into the 409 analysis which I will have to put the witnesses on on Monday, which we will be [628] coming back before the Court and the recent jurisprudence that has analyzed section 409 which again is to keep from the Court, exclude from the Court, documents and records which the Department uses to enhance safety on highways. If it goes to the issue of knowledge that is one issue. If it goes to the issue of liability, plaintiff is attempting to prove his case of liability. This accident happened on this date because a complaint was made about the bridge. That has no relevance. That has no direct bearing on the causative factors of the accident that this suit that has been brought which damages have been claimed by these individuals. And if they are going to do it for all times this bridge was built in 1928 and I don't know how far the records go back, we can—as much as five years is what we maintain from the Department.

MR. GARRETT: I am only offering the records that have been produced to me in response to discovery requests. I would like to point out, Your Honor, he has given you two reasons not to allow this information in. In the first reason he refers to 409 materials. This is an actual bridge inspection report.

MR. SANDERS: That is a federal inspection report, no question.

MR. GARRETT: This is a bridge inspection report. These bridge damage reports, complaint records and [629] records of complaint are in no way 409. They are

not referred to in 409. I have not heard testimony from any witness that they are reviewed in connection with the bridge inspection report. I—why he wishes to exclude the information is beyond me. I think it does in fact reflect the state and leading up to this accident, the condition of this bridge, what goes wrong with it and it indicates further in some instances the fact that there have been repeated citings in the bridge tenders reports of single car accidents that don't show up in anybody's accident records. The guy keeps going. All of a sudden another section of the bridge is missing. That is contained in the bridge tenders report. Some of it is contained in the complaint records. Some of it is contained in reports of bridge damage. And he is trying to exclude that, I don't think it can be excluded under 409 and I think it is entirely relevant to the condition of this bridge because it increases the incidences of accidents.

MR. SANDERS: Well, Your Honor, at some point in time we are going to get into the 409 issue, but I can cite to the Court a recent Third Circuit opinion which was just released June 30, 1993, where the Third Circuit affirmed the trial Courts, actually overruled the Trial Court inclusion of a letter from a Department of Public Safety State Trooper through the department requesting they install no parking signs on the side of the road. Now that's not a bridge inspection report. Not only [630] is it not a bridge inspection report, it—and the Third Circuit overruled the Trial Judge allowing it into evidence saying it is clearly excluded by 409. I have a copy of the decision here for the case. I will give opposing counsel.

THE COURT: At this point in time I am going to sustain the objection. If you wish to put it in, put it in the in the form of a proffer and I can always change my mind if I—

MR. GARRETT: At this time, Your Honor, I would proffer as D-8 bridge damage reports maintained by the Department of Maintenance in Bridge City, or the Maintenance Division of that Department of Transportation

office, complaint records, records of complaints. I have one or two other things, Your Honor, if you would like me to make that offer right now.

THE COURT: Yes.

MR. SANDERS: No. He doesn't have to identify the record. I am sorry. Just identify by a different number because that is different than this. This is all one category.

MR. GARRETT: Oh, I would at this time, Your Honor, offer D-9 by means of proffer.

THE COURT: Yes.

MR. GARRETT: [631] Which is a Louisiana Department of Transportation and Development bridge maintenance section generated inspection schedule which contains references to the—

MR. SANDERS: The actual bridge inspections.

MR. GARRETT: The actual bridge, well, it contains a reference to when the bridge is scheduled by them to be inspected and when it was last inspected.

THE COURT: Let it come into the record in the form of a proffer, not as evidence.

MR. GARRETT: Okay. And again there are more of these than just one, Your Honor. I offer them all in globo.

* * * *

[664] [MR. SCHMIDT:] Q. Have you reviewed any accident data regarding the Highway 11 Bridge?

A. Yes, sir.

Q. Could you go through that with us?

A. The accident—

MR. SANDERS: Wait a minute. Your Honor, I am going to object to any accident data that he may have reviewed. I don't think it is in evidence yet. Again we will go back to, I guess, the 409 scenario again.

THE COURT: What type accident data are we talking about?

MR. BORSTELL: We are talking about actual accident reports.

MR. SCHMIDT: Actual accident reports.

MR. BORSTELL: Which that blue matrix over there is their compilation of those accident reports from '81 to '89. And we were given some recent ones. We have not been given anything as far as the accident locater files. These are the hard copies of the actual police reports that have been provided by the State.

MR. SANDERS: Your Honor, the Supreme Court of Louisiana, [665] November 20, 1992 in the case of Beecher V. Keil, (spelled phonetically) granted a writ reversing the Trial Court. Of the Trial Court's ruling, "That the Department of Transportation and Development's accident data for Airline Highway is admissible is set aside. The Trial Court must address the admissibility of each item of evidence as it was offered in accordance with the criteria of 23 USC, Section 409. If the Trial Court finds that the data were compiled pursuant to 23 US Section 152 or for the purpose of developing any highway safety construction project which maybe implemented utilizing Federal-Eight highway funds they shall not be admitted into evidence." Citeing 23 USC Section 409, 1991.

THE COURT: Are you saying accident reports fall under 409?

MR. GARRETT: Your Honor, if I may?

MR. SANDERS: Your Honor, all of the accident data which they got, they got from us. All of the data that we got from the accident locater data. All of it.

MR. SCHMIDT: But they could have been independently done, couldn't they, from each of these? I mean, let's not—

THE COURT: Well, I am not going to hear anymore. It is [666] a good time right now for us to stop for our noon recess. Come back about 1:45.

AT THIS TIME, A RECESS WAS TAKEN.

* * * *

[669] EXAMINATION BY MR. SCHMIDT:

Q. Did you review the documents that showed the accident reports? Did you review accident reports?

A. I reviewed the accident reports given me for 1990 and '91.

MR. SANDERS: I am going to renew my 409 objection.

THE COURT: I want you to tell me how those accident reports come under 409 for the record. You know, I have read the Supreme Court ruling on the writ application in Beecher versus Keil. 607 So. 2nd, page 549, a 1992 decision. And I don't see where that has anything whatsoever to do with accident reports.

MR. SANDERS: Judge, it goes back again to the purpose of 409 as a free discovery tool for plaintiff's counsel. In the prohibition of using Department of Transportation documents, which are derived solely for the purpose of safety highway improvements under 152, inspection—railroad crossings, et cetera, et cetera, et cetera. I mean, I know the Court has heard this four times.

THE COURT: At least.

MR. SANDERS: Clearly, clearly, I think the Court may want [670] to agree that the federal bridge inspectors that are paid for with federal funds that go out every six months or two years or however long and do these complicated inspections and come up with these numbers where they rate bridges is probably more likely than not true 409 material.

THE COURT: I agree wholeheartedly.

MR. SANDERS: The Court probably agrees that the accident locater data that Mr. Marson would come and testify to where we can run—as the Court remembers his testimony earlier he says we used to actually get with the accident reports. But we got modern now. We got computers. So the Department of Public Safety just sends us a tape and on that tape is the data from the accident reports.

THE COURT: Uh-huh.

MR. SANDERS: And it saves us having to input it into our computer so we can manipulate it and find out by milepost or this and that or wherever these different criteria are. The accident data which we were ordered to produce, which were produced through discovery, the only way you can get that type of accident data is from the accident locater reports. You can't locate it any other way. You would have to go through every Department of Public Safety record one by one. They are not indexed. They are not available. [671] So you can't get them any other way and the Department, the only reason the Department would get the accident reports is for either—is for the purpose of trying to decide if there is some data contained in those reports which is not in the 409 locator data and all of that would be used by the Department.

It is just like in the case that I cited from the Third Circuit where the Court of Appeal overruled the use of the Department of Public Safety State Trooper letter to the Department of Public Safety. I think the Court would agree that would not generally fit what you and I would think 409 meant.

THE COURT: Yes.

MR. SANDERS: When I first started researching 409 I was amazed at what was excluded and the Court remembers my memorandum where I cited a whole slew of cases, newspaper articles which cite the most dangerous intersection in Arkansas excluded under 409. That wasn't a bridge inspection. That wasn't an accident report. That was a newspaper article which cited data which is compiled by the Department for those purposes.

And I understand, and I understood and empathize with the Court's concern because it sounds odd if they could go out and find it by themselves, if they could go to the Department of Public Safety and say I know there was an accident report number C861384, pull it for me, [672] that they ought to be able to come in here and say

Judge, I have got this accident report. I want to introduce it into evidence.

And I would submit it to the Court that you may want to think there is some evidentiary concerns about getting that accident report in. And because they got it from the Department all of a sudden they can jump around all that, because we have it. The only reason the Department of Transportation and Development has it is because of the accident locater data. We couldn't get it any other way. We would have to go to the Department of Public Safety and try to find the doggone thing. And we don't do it. And the only reason we use it is for the enhancement of safety. I could even cite some more recent cases, Judge, because I ran a Westlaw search before we came in the court.

THE COURT: Don't do that. Because I am not going to read them right now.

MR. SANDERS: I understand, Judge, but it goes back to the issue of I hate to say that 409 says what it says. But it really—

THE COURT: Well, you see 409 is so foreign to everything that we do.

MR. SANDERS: That is correct. But look at what the purpose of it is, Judge. I didn't make the law. I didn't write it. Congress wrote the law. They [673] sat down and they said as a matter of federal law preempting state law, first as to admissibility and now as to discoverability, we are going to say no more. We are not going to have long detailed testimony where we have got to analyze the actual locater data item by item. Item by item.

MR. SCHMIDT: That is what you did with your experts, isn't it?

MR. SANDERS: If the Court is going to let it in, you're doggone right. We are going to be here for days analyzing accident reports for—

THE COURT: Here's my problem, in addition to 409, I have a relevancy problem.

MR. SANDERS: Your Honor, I think I have raised the relevancy problem.

THE COURT: The bridge is either defective or it's not defective.

MR. SANDERS: That has been the States—

THE COURT: This witness testifies that is is defective. Other witnesses testified, that it—probably will testify that it is not defective. Now I have got a group of experts and I am going to have to go through their testimony and decide which piece of testimony I am going to adopt and [674] make it my finding of fact.

MR. SANDERS: I understand.

THE COURT: I really, I am not interested in all these accidents that have occurred on that. Maybe that would bolster, if I find for the plaintiffs maybe they feel that this would bolster my decision because there have been a number of accidents on this bridge but—

MR. SANDERS: That is the problem the State has, Your Honor. Everything is on the table until you take it off. That is why we continually renewed the motion. We are prepared if they want to go through all these accident reports, if they want to go through the ones in 1981 then I am going to get them to ID the ones in 1981. I don't believe they are relevant to any issues in this case, but if they want to we will go through them all. We will have the testimony on it. We will do a grid on 1991 accidents if that is what they want. I have no objection to—

THE COURT: Let me hear from your opponent.

MR. SCHMIDT: I think the only thing we are trying to show is a red flag goes up when you go over fifty percent. We are showing that over fifty percent of the accidents in '91 were under wet conditions. The State did do one thing. They put up signs. And we are going to get through [675] his testimony that those signs they put up were ineffective because the accident ratio went up more and so if they are going to try—

MR. SANDERS: Well, Your Honor, I object to the characterization of the evidence in advance.

MR. SCHMIDT: Let me finish talking please, sir.

MR. SANDERS: I mean—

MR. SCHMIDT: So what we are leading to because you are asking the relevancy of why we have it is because we are just talking about the one section going right before the bridge where they have the thousand feet going through the sign and I would like him to break it down to show that even with these signs now the wet weather accidents have gone up and they have had no difference at all in stopping or preventing these accidents and Mr. Blaskei's deposition, I mean testimony at trial said the same thing. That these signs would have no safety value whatsoever because number one, they are advisory and number two, it is in such bad shape that it wouldn't help. And so, that is why the relevancy is to show why, not 409, he is telling me if I had a library and I didn't index my library and we went through and spent five years finding different books in the library because it wasn't indexed we could use that material. But if the materials is indexed in the library and I can go to a card catalogue and get [676] material I can't use it.

This stuff, 409 is not generated for their specific purposes to make their highway safety. This is done because of accident reports that is filed out in every accident weather it is in this parish or it is in Caddo or wherever it is. This is an accident report. It shows the conditions whether wet or dry which is relevancy on the grid. It is directly relevant.

THE COURT: All right, Mr. Sanders.

MR. CAIRE: Well, Judge—

MR. SANDERS: Pass the baton this time, Your Honor.

THE COURT: All right, Mr. Caire.

MR. CAIRE: May I stand to try to shed some light, not very much and within hopefully one hundred and twenty seconds. Judge, there has been cases on the Highway 11 bridge which have been going on, going on since accidents from 1986. Material has been begin to be gathered 1988, '89. There was a litigation in a case

that decided prior to the amendment by Congress that all of this was discoverable.

Therefore, we had gathered the information that you have seen to be analyzed was being gathered. I didn't feel I could conceal it or not disclose it. And Your Honor wanted us to disclose it. I had it before Congress amended [677] the statute. We had the computer printouts.

The Courts of Louisiana had ruled it was discoverable. Not admissible, but discoverable. Writs were taken to the Supreme Court and denied. It was discoverable. We had it. Later last year, I think it was, Congress comes along and amends the statute. I now have in my possession information which I had discovered prior to the time Congress amended the statute. It has been held that that statute is retroactive.

So here we find ourselves looking—I agree with you about the relevancy, but as to all of these accidents, the best way for me to say it is something I learned in law school they were trying to teach me, and I don't know if I ever learned it. It appears to be the fruit of the poisonous tree. I had the computer printout that told me where all these accidents, these hard-copy accidents were. We wanted to look at them and analyze them. Now comes along, because we just didn't want a number, we didn't want somebody throwing numbers out there at the Court.

We recognize the relevancy problem and we intended to, if that information got in, to say hey this is irrelevant. Look at the different factors in all of these accidents and there is the analysis. But then Congress comes along and amends the statute. So I think that this is accident history. Certainly the reports that I presented to counsel where there was information that we received off of the computer printouts that told us where to go get it.

[678] THE COURT: Let me ask you this. I hate to interrupt you.

MR. CAIRE: That is all right.

THE COURT: But let's assume, well let's back off. What you's telling me is that had they gone to the Motor Vehicle Division of the Department of Public Safety and Corrections and marshaled together all of these accident reports themselves that would be one thing, but simply because they got them from you they are not admissible, clearly not admissible.

MR. CAIRE: That is right, Judge, because I got them—because I got them—

THE COURT: Does that make sense?

MR. CAIRE: Well, I think so. It is the fruit of the poisonous tree. But then you have the relevancy problem.

MR. SCHMIDT: Your Honor, that is why I brought up about the index of a library, and I agree with you exactly. And remember these are generated by the Department of Safety, not the Department of Transportation.

THE COURT: I know.

MR. SCHMIDT: [679] By a different department altogether, these accident reports.

MR. CAIRE: The only reason it didn't say—

MR. SANDERS: Counsel—Judge, I can explain that issue. The only reason we got the hard copies, we wouldn't have the hard copies of the reports other than we had to disclose the accident locater data which somebody was going to analyze, and do. So you had to get the hard copies to refute what is in the accident locater data if there is errors. It goes on and on and on.

THE COURT: Let me interrupt you.

MR. SANDERS: All right.

THE COURT: I tell you what I am going to do. I am probably going to commit error. It won't be the first time, probably not the last. But what I am going to do in this case, I am going to rule that 23 USC Section 409 is applicable in this case and I am going to sustain your objection, because I think I could sit here and listen to all this for two days and it really would not have that much bearing on this case anyway. The bridge is either defective or it's not defective.

MR. SCHMIDT: All right. So your ruling is no 409 evidence for either side.

THE COURT: [680] That is right.

MR. SCHMIDT: Okay. Let's move on.

THE COURT: Good. Now you apparently know what 409 evidence is. At sometime during the course of this trial in ten seconds or less I would like you to tell me what it is.

MR. SCHMIDT: Right.

THE COURT: Not Mr. Sanders. He could go on for two days.

MR. SCHMIDT: I think it is—

THE COURT: I am kidding. Let's go.

MR. SCHMIDT: One other thing, Your Honor. Should I proffer, this will definitely, if I proffer this, it will definitely enlarge the trial time and if they are going to go through their matrix it will prolong it a number of times.

THE COURT: It is up to you. I can't keep you from proffering something.

MR. SCHMIDT: Let me proffer the—

MR. SANDERS: Your Honor, would you like to reserve and have this at the end?

[681] Yes. You would be surprised how many people forget to make their proffers when you put it at the end.

MR. SCHMIDT: I would like to proffer the '90 and '91 accident reports.

DIRECT EXAMINATION BY MR. SCHMIDT ON THE PROFFER:

Q. And what was your analysis of it?

MR. SANDERS: Wait a minute. Your Honor, my understanding of the rules of proffer that you don't have the actual testimony. Well, I guess we—

THE COURT: You can.

MR. SANDERS: All right.

THE COURT: It is proffered. I am not going to consider it in the decision of this case.

THE COURT: Let ust know when you are off the proffer.

MR. SCHMIDT: Proffer right now.

THE WITNESS: In 1990 fifty-two percent of the accidents were on wet pavement, forty-eight percent on dry. 1991 sixty-nine percent were on wet pavement, thirty-one percent on dry.

EXAMINATION BY MR. SCHMIDT:

Q. Is that pavement or in the grill?

A. That is pavements on the accident reports given me. That is both on the grid and off. If you want the ones on [682] the grid I will count them.

Q. No, no, no.

A. Okay.

Q. Let's just move on because it is starting to—

THE COURT: Do you have any questions on any cross on the proffer?

MR. SANDERS: Are you through with the proffer? That is it.

MR. SCHMIDT: Uh-huh.

CROSS EXAMINATION BY MR. SANDERS ON THE PROFFER:

Q. How many accident reports did you review in 1990?

A. In 1990 I was given twenty-three.

Q. How many for 1991?

A. Excuse me, that was 1991.

Q. Oh, I am sorry, twenty-three for 1991. How many for 1990?

A. Twenty-nine.

Q. So more accidents in 1990 than there were in 1991?

A. Yes, sir.

Q. That you reviewed?

A. More than I received? I don't know, I assume this is all of them.

Q. You don't know that for a fact?

A. No, I don't. This is just the ones that I received.

Q. That was information given to you by plaintiffs' counsel?

A. Yes, sir.

Q. How were you able to verify that those accidents were indeed on the US 11 bridge?

[683] A. The from the milepost and from the sketch, the officer's sketch.

Q. So in other words, if the officer's sketch indicated they were on bridge accidents you counted that as an on bridge accident?

A. Pardon?

Q. If the officer's sketch indicated that as an on bridge accident you counted it?

A. Right. I marked—they had some of them off the bridge, right off the edge of the bridge.

Q. You counted those?

A. Yes, sir. I counted those as either wet or dry and in 1990 we had ten of them off the bridge.

Q. In 1990 ten of the twenty-nine were off the Bridge?

A. Yes, sir.

Q. Okay. And for 1991? How many of them were off the bridge?

A. In 1991 I scratched out the ones that were off the bridge. And I should have done it on the ones in 1990 but it was late. But there were, wait, there were a total of twenty-three. I only counted sixteen of them because seven of them were off the bridge.

Q. Seven were off the bridge in 1991?

A. Seven out of twenty-three, yes, sir.

Q. Now then on the ten that were off the bridge how many of them were wet and how many of them were dry?

A. In 1990 the ten that were off the bridge one, one wet, one dry, two wet, two dry, three dry, three wet, four dry, five dry. How many wet ones did I have?

Q. Keep going. I have got my fingers up. You just keep counting.

A. I have another wet one.

[684] Q. You have another wet one. Okay, keep going.

A. One more wet and another wet.

Q. More wet accidents than dry accidents off the bridge in 1990?

A. Yes, sir.

Q. Let's go to 19—maybe I ought to quit while I am ahead.

MR. SANDERS: That is fine. I don't have anymore questions on the proffer.

* * * *

APPENDIX G

22ND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

No. 87-10117 Div. "B"

JEWELL COUSINS, *et al.*

versus

HERBERT K. BUSH, *et al.*

Consolidated With

No. 87-12018 Div. "C"

HERBERT K. BUSH, *et al.*

versus

STATE OF LOUISIANA, *et al.*

REASONS FOR JUDGMENT

This matter came before the Court for trial on the merits on April 3, 1989. The matters of liability and damages were to be adjudicated in bifurcated proceedings, the liability portion of which concluded on April 6, 1989.

After reviewing the evidence offered at trial, the Court finds that can be no doubt that the State of Louisiana was on notice concerning the conditions that existed on the Highway 11 Five Mile Bridge on September 20, 1986, the date of the accident that is the subject of these actions.

The Court, in determining that said notice to the State came by way of the State's own internal memoranda, establishes this finding without the necessity of considering any other items of evidence offered at trial.

The May 13, 1986 memorandum of Mr. Alex Kinchen directs the State of Louisiana's attention to numerous accidents that had previously occurred in area of the bridge's north draw. The Court also relies on three internal bridge reports, namely memoranda of District 0-2 for the years 1983, 1984, and 1985, in which the bridge was given the following ratings:

1983 - rated a "3" overall;
1984 - rated a "2" overall;
1985 - rated a "2" overall.

These items alone afforded the State of Louisiana more than adequate notice of the hazardous and often critical conditions then existing on the Highway 11 bridge. Therefore, the Court finds the area of that highway known as the North Draw of the Five Mile Bridge to have created a hazardous condition.

In their testimony offered at trial, Dr. Oscar Griffith, Professor Robert Lipp, and Engineer Robert Roth alerted the Court's attention to multiple minor factors—factors which, if taken one-by-one and in isolation, were minor contributing factors. For example, the drawbridge's pin was malfunctioning as early as 1985 and, according to Engineer Roth's testimony, continued to malfunction as recently as 1988, two years after this accident occurred (P3, Bush 8). Lack of proper pin placement caused a one-inch displacement in leaf closure, created conditions of uneven traction, and contributed to roadway surface misalignment. Examination of another factor, namely, marked diffrentials in coefficients of friction between the metal grid of the drawbridge and the surrounding asphalt surfaces, exacerbated the uneven traction situation. Factors such as the lack of shoulders on the bridge and the absence of protective barriers separating north and south-

bound lanes of traffic, while arguably minor in and of themselves, contributed to the hazardous conditions that existed on September 20, 1986.

Strong wind gusts of 23 mph from a northeasterly direction together with common sense and ordinary experience point to a tendency on the part of drivers to react when they hit a drawbridge with an open grid. As early of 1985, evidence contained in the State's own file reveals that substantial sections of this grid were missing. This minor but significant factor together with the rainy and windy weather conditions that existed on September 20, 1989, could have caused driver-steering input when a tire hit a missing section of the Five Mile Bridge grid.

All of these minor factors are small when they are viewed in isolation. When viewed together, each functions like a piece of a mosaic, to ultimately form a complete picture. All point to and emphasize a common centerpiece: namely, these factors create a wet-weather hazardous condition on the bridge which was known to the State of Louisiana and which could have been corrected anytime since 1985. It is distressing to note that the 1983 internal bridge report rated all safety factors on this bridge to be "zero."

Thus I find that the State of Louisiana failed to maintain, and give adequate warning and notice to drivers that this ancient 1928 bridge on Louisiana Highway 11, known as the Five Mile Bridge, was dangerous in wet weather and at speeds in excess of 35 mph.

As to Mr. Bush: the Court finds that Mr. Bush did not establish that his presence in Mr. Cousins' lane of traffic occurred absent his own fault. He testified that his speed was in the neighborhood of 40-45 mph in good weather. When asked if he adjusted his speed for the inclement conditions of September 20, 1989, he said "Yes, I slowed to 40-45 miles per hour." The Court finds that he knew or should have known of the many accidents associated

with the Highway 11 bridge. He crosed the bridge on a regular basis for a period of at least eight years and has been a resident of Slidell, Loulsiana, for eleven years.

Trooper Sylve stated that Mr. Bush's alleged speed was an unsafe speed for the windy and rainy conditions that existed on September 20, 1986. Curiously, Mr. Cousins was going 25-35 miles per hour and flagging traffic to pass him.

The Court puts no stock in the intoxication argument offered at trial and does not find Mr. Bush to have been intoxicated though he did admit to consuming "perhaps two beers" at a company picnic. The Court finds that the smell of alcohol in the Bush vehicle came solely from the damaged beer cans in a plastic cooler that had been placed in the front seat by Mr. Bush earlier that morning. The cooler had previously been in the pick-up truck owned by Mr. Bush, which a friend had boorrowed on the day of the accident.

The Court does not consider reliable the testimony of the State's expert witness, Mr. Blaschke. He testifies only for state governments and, by his own admission, says that he is unwilling to testify against a State. Moreover, he did not reconstruct the accident and chose to base his opinion on statistics and data furnished to him by the State of Louisiana, the authenticity and correctness of which he did not question. The Court, therefore, dismisses all of his testimony as mere conjecture except for his statements directed to Mr. Simon on cross-examination in which he admitted that the Five Mile Bridge is indeed a substandard bridge and that the roadway in question has more potentional for harm than most.

For the abovementioned reasons, this Court assigns to the State of Louisiana, 85% fault; to Mr. Bush, 15% fault; to Mr. Cousins, zero percent fault.

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

BRIDGE INSPECTION REPORT

PAGE 1 OF ___

T.	PARISH	ROUTE	CONTROL	SECT.	LOG MILE	I.D.	BRIDGE TYPE	YEAR BUILT	DESIGN LOAD
2	ORLEANS	US-11	018	02	0000	1	SDF-16	1928	15

BRIDGE NAME OR FEATURE CROSSED	BRIDGE LENGTH	HORIZONTAL CLEARANCE	VERTICAL CLEARANCE	BRDG.SURF.TYPE	ADT
NORTH + SOUTH	24,922	30	-	ASPH	10,998

SCHEDULE MAINTENANCE REPAIRS

X IMMEDIATELY ___ ROUTINE

ITEM RATINGS

GOOD 8-9 FAIR 6-7 POOR 4-5 CRITICAL 0-1-2

STRUCTURE NUMBER: STATE DIST	PAR	CONT	SECT	LOG MILE	ID	PARISH OR CITY P	PAR	LATITUDE	LONGITUDE	ID
	022	760	150	2000	01	2	3 4 5 6 7 8	9 10 11 12 13 14	15	
							0 1	3 0 1 1 5 2		

RECALL NUMBER: 16 17 18 19 20 21

(90) INSPECTION COMPLETE: MO. 22 23 | DAY 24 25 | YR. 26 27

DATE NEXT INSPECTION: MO. 28 29 | DAY 30 31 | YR. 32 33

5 YR. INSPECTION	UNDERWATER INSPECTION	TOTAL RATING	OVERALL STRUCTURE RATING
34	35	36	37
1	4	N	2

DUPLICATE COLS. 2 - 15 OF CARD 1	TRAFFIC SERVICES													(65) APPROACH								(58) DECK							
	CONDITION	REG. SIGNS	STRIPING	HAZARD MARK.	WARNING SIGNS	WARNING DEV.	CLEAR SIGNS	CLEAR. DEV.	AERIAL SIGNALS	NAV. LIGHTS	ROWY. LIGHTS	LEGIBILITY	VISIBILITY	COND. (65)	ROWY. SURFACE	CONST. JOINTS	SHOULDERS	EMBANKMENT	APPR. SLAB	RELIEF JOINTS	GUARDRAILS	RETAIN. WALLS	COND. (58)	ROWY. SURFACE	DECK	CURBS	SIDEWALKS	BRIDGE RAILS	PARAPETS	JOINTS	JOINT SEALS
	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46
IN THESE FOURTEEN COLUMNS	6	6	6	7	6	6	1	1	1	7	7	6	6	8	6	1	5	5	2	1	6	1	2	5	5	6	1	5	5	2	3

DUPLICATE COLS. 2 - 15 OF CARD 1	(59) SUPERSTRUCTURE													(60) SUBSTRUCTURE									
	COND. (60)	BEARINGS	GIRDERS	FLOORBEAMS	STRINGERS	TRUSSES	LOWER CHORDS	DIAG. BRACING LOWER LAT. SYSTEM	UPPER LAT. SYSTEM	PORTAL FRAMES	VERTICALS	DIAGONALS	SWAY FRAMES	UPPER CHORDS	COND. (60)	ABUTMENTS	BACKWALLS WINGWALLS	BULKHEADS	PEDESTALS	BENTS	CAPS	PILING	BRACING	PIERS	COLUMNS	FOOTINGS	FOUNDATION
	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43
IN THESE FOURTEEN COLUMNS	6	6	6	7	1	1	5	6	1	1	1	4	1	1	6	6	6	6	1	6	6	6	1	5	1	1	1	1

DUPLICATE COLS. 2 - 15 OF CARD 1	(61) WATERWAY								MOVABLE SPANS						GENERAL NOTES														
	COND. (61)	EMBANKMENT	REVETMENT	CHANNEL	SPUR DYKE	VEGETATION	FENDER SYS.	DRIFT	SCOUR	CONDITION	MECH. SYS.	WEDGES	GREASING	ELECT. SYS.	FAIRLEADS FAIRLAIRS	CONTROL PANEL	OPERATOR HOUSE	NAV. SIGNALS	RIVET & BOLTS	WELDS	CORROSION	FATIGUE	PAINT	CONC. SPALLS SCALING	CONC. CRACKS	TIMBER DECAY	CONNECTIONS	POSTED OR UNDER LOAD	SETTLEMENT	MEMBER ALIGN.	BEARINGS	DRAINAGE	ROWY. ALIGN.	CLEARANCES	EROSION SCOUR	UTILITIES
	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51
IN THESE FOURTEEN COLUMNS	6	6	6	6	1	1	7	7	6	6	6	4	6	6	7	6	6	7	6	6	6	6	6	2	0	2	5	E	E	2	E	6	2	4	F	6

DUPLICATE COLS. 2 - 15 OF CARD 1	POSTED LOAD		(36) TRAFFIC SAFETY FEATURES				APPRAISALS			SURFACE THICKNESS	TYPE WORK RECOMMENDED																							
	SINGLE VEHICLE	VEHICLE COMBINATIONS	BR. RAIL TRANSITION	APPR. GUARDRAIL	GUARDRAIL ENDS	UNDER CLEAR. (69)	WATERWAY ADEQUACY (71)	APPR. ROADWAY ALIGNMENT (72)			#1			#2			#3			#4			#5			#6			#7			#8		
	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52
IN THESE FOURTEEN COLUMNS	1	1	1	1	0	0	5	6	8	2																		T	R							

REMARKS: 2nd appendix.

FILED IN EVIDENCE DEF # 87-1201 SEC. "C" 6 DEC 88

DEPUTY CLERK

5-10-89 DATE

APPROVED BY [signature] INSPECTION DATE

[signature] DATE

BEST AVAILABLE COPY

No. 95-1227

Supreme Court, U.S.
FILED
FEB 22 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT,

Petitioner,

vs.

PAUL DOUCET, RUSSELL DOUCET, MICHAEL DOUCET and HERBERT CHAMPAGNE,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal, First Circuit, State of Louisiana

RESPONDENTS' BRIEF IN OPPOSITION

DOUGLAS MICHAEL SCHMIDT
Counsel of Record
WAYNE E. GARRETT
Of Counsel
LAW OFFICES OF
DOUG SCHMIDT, APLC
Attorneys for Respondents
335 City Park Avenue
New Orleans, Louisiana 70119
(504) 482-5711

8336
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED FOR REVIEW

1. Does the failure to raise the issue of statutory privilege under 23 U.S.C. § 409, as it applies to materials allegedly produced under 23 U.S.C. § 152, at the trial level, in the appellate court or before the state Supreme Court, deprive petitioner of its right to seek a writ of certiorari on such a question.

2. Is the 1995 amendment to the statute properly before this Court because the amendment was enacted after the final state court judgment and was never raised before the state court; in the alternative, does the addition of the word "collect" or "collected" in the statute make any change in materials and/or documents described as excluded under 23 U.S.C. § 409.

3. Does the statutory privilege against the discovery and admissibility created by 23 U.S.C. § 409 apply to evidence demonstrated to have been gathered or prepared by other agencies and not in any way connected with any program under 23 U.S.C. §§ 130, 144 and/or 152.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Citations iii

Factual Procedural Overview 1

Reasons for Denying the Writ 2

I. The issue of the privilege of Section 23 U.S.C. § 409 as it applies to "reports, surveys, schedules, lists or data" compiled pursuant to 23 U.S.C. § 152 was never raised at the state court level nor in the appellate courts nor in the application of the state Supreme Court. 2

II. The 1995 amendment of 23 U.S.C. § 409, adding the words "or collected" after the word "compiled", does not present any change in the law and is not properly before this Court as the amendment was never raised at the state court level; further, that the amendment would not have affected the admissibility of any of the evidence presented to the lower courts; in the alternative, any such change would be substantive because it would deprive petitioner of state tort rights. ... 5

III. The decision of the State Court of Appeals is correct in its interpretation of 23 U.S.C. § 409, and its admission of evidence including police reports and other documents not compiled by the DOTD. 7

Contents

Page

IIIA. The statutory privilege created by 23 U.S.C. § 409 should be read as integrated with the other sections of that title and the programs arising under such sections, namely §§ 130, 144 and 152. 9

IIIB. The DOTD interpretation would bar consideration of evidence, not compiled or collected under any applicable statutory provision, preventing consideration by the court of admissible evidence. 11

IIIC. The evidence sought to be excluded was prepared by state experts and not used for any purpose pursuant to 23 U.S.C. §§ 130, 144 and/or 152. .. 18

IIID. The cumulative effect of the evidence, including police reports, bridge tender complaints, independent observations by experts, adduced at trial as well as other admissible evidence confirms the court's ruling. 19

Conclusion 21

TABLE OF CITATIONS

Cases Cited:

Alyeska Pipeline Service Co. v. Wilderness Society, 95 S. Ct. 1612, 421 U.S. 210 (1975) 16

Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988) 16

Contents

Page

Bradley v. School Board of City of Richmond, 416 U.S. 696, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974) 15, 17

Cousins v. Berteaut, 22nd JDC case number 89-2066 .. 20

Fox v. Parker, 626 F.2d 351 (1980) 16

Gersman v. Group Health Ass'n, Inc., 975 F.2d 886 (D.C. Cir. 1992) 16, 17

Hamilton Co. v. State of Massachusetts, 73 U.S. 632, 6 Wall. 632, 18 L. Ed. 904, U.S. Mass. 1867 ..... 2, 5

Hormel v. Helvering, 61 S. Ct. 719, 312 U.S. 552, 85 L. Ed. 1037, *cert. granted*, 61 S. Ct. 35, 311 U.S. 626, 85 L. Ed. 397 3

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 110 S. Ct. 1570, 108 L. Ed. 2d 842 (1990) 16

Kitts v. Norfolk and Western Railway Co., 152 F.R.D. 78 (S.D.W. Val. 1993) 10

Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) . 16

Landgraf v. USI Film Products, 968 F.2d 427 (5th Cir. 1992) 17

Martinolich v. Southern Pacific Transp. Co., 532 So. 2d 435 (La. App. 1 Cir. 1988) 14

Contents

Page

Southern Pacific Transport v. Yarnell, 890 P.2d 611 (Ariz. 1995), *writ refused*, __ U.S. __, 116 S. Ct. 352 ... 7, 8, 14, 21

United States v. Nixon, 413 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) 10

United States v. Schooner Peggy, 1 Cranch 103, 2 L. Ed. 49 (1801) 15

Walker v. Sauvinet, 92 U.S. 90, 23 L. Ed. 678, U.S. La. 1875 3

Wiedeman v. Dixie Elec. Membership Corp., 627 So. 2d 170 (La. 1993) 6, 7, 11, 12

Statutes Cited:

23 U.S.C. § 130 .....i, 5, 7, 9, 18, 21

23 U.S.C. § 144 .....i, 1, 5, 7, 9, 18, 21

23 U.S.C. § 152 .....i, 2, 5, 7, 9, 18, 21

23 U.S.C. § 409 ..... *passim*

Public Law 104-59 5

Other Authority Cited:

Webster's Ninth Collegiate Dictionary 14

Contents

Page

APPENDIX

Appendix A— Excerpted Transcript Dated July 29, 1993 ..... 1a

Appendix B — Motion In Limine Filed June 4, 1993 ... 15a

Appendix C — Judgment of the 22nd Judicial District Court, State of Louisiana Dated May 13, 1993 ..... 21a

FACTUAL PROCEDURAL OVERVIEW

During a rainstorm on February 2, 1992, the vehicle operated by Herbert Champagne lost control crossing a grid located on Louisiana Highway 11 bridge, crashing head on into the vehicle operated by Paul Doucet, in which his two sons, Russell and Michael were passengers. Moments before impact, Paul Doucet threw himself in front of his two sons, attempting to protect them from injury. As a result of that action, the impact hit him full on in the face, causing severe lacerations to his face, including his lips and tongue, nose and scalp and causing mild brain damage, leaving him with substantial cognitive deficits. Despite his efforts, both of his sons received even more severe injuries, Russell Doucet, 20 years old at the time, suffering such a severe spinal fracture that he was rendered paraplegic and will remain so the rest of his life; Michael Doucet, only 17 at the time, suffered a spinal fracture, which has rendered him disabled.

The grid on the bridge at which the accident occurred had been the occasion of numerous other collisions, with numerous parties, who deal on a daily basis with accidents on the bridge, namely the state troopers who report said accidents and the bridge tenders who observe said accidents, even single car accidents when it is wet, consider the grid to be very unsafe for use in wet weather conditions.

At the initial hearing on the motion *in limine,* and to compel production of documents, the trial court correctly maintained that 23 U.S.C. § 409 exclusion for information obviously generated under 23 U.S.C. § 144. Although the court initially indicated it would rule on other documentation, it recalled that order and referred it to the trial of the matter. At the trial of the matter, after hearing substantial evidence, the court ruled that it was excluding all documentation as being excluded under 23 U.S.C. § 409.

An appeal was taken from a trial judgment absolving DOTD from any negligence in its maintenance operation of the bridge and grid in question; the First Circuit Court of Appeal reversed the trial court's findings on liability, admitting individual police reports, work sheets prepared from said police reports when not prepared by DOTD personnel, other independent records and other records referred to in an earlier 1990 unpublished decision in which the bridge was found defective and a cause-in-fact, of an accident causing that head-on collision remarkably similar to the one at bar. Application was made to the Louisiana Supreme Court for a writ of certiorari and it is to be noted that said application did not refer to any programs conducted under 23 U.S.C. § 152 which would give rise to a privilege under 23 U.S.C. § 409; neither did that writ or any prior proceedings in the state courts consider the 1995 amendment, enacted after the final state court judgment.

REASONS FOR DENYING THE WRIT

I.

THE ISSUE OF THE PRIVILEGE OF SECTION 23 U.S.C. § 409 AS IT APPLIES TO "REPORTS, SURVEYS, SCHEDULES, LISTS OR DATA" COMPILED PURSUANT TO 23 U.S.C. § 152 WAS NEVER RAISED AT THE STATE COURT LEVEL NOR IN THE APPELLATE COURTS NOR IN THE APPLICATION TO THE STATE SUPREME COURT.

It is a long standing principle of law that issues not raised in the state court level shall not be reviewed by this Court. In *Hamilton Co. v. State of Massachusetts*, 73 U.S. 632, 6 Wall. 632, 18 L. Ed. 904, U.S.Mass. 1867 it was stated:

> Questions not decided in the state court, because not raised and presented by the complaining party, will not be re-examined in this court, on a writ of error sued out under the 25th section of the judiciary act . . . Clear and necessary intendment that the question was raised and must have been decided as claimed, in order to have induced the judgment, is sufficient, but *it is not sufficient to show that such a question might have arisen and been applicable to the case,* unless it appears in the record that it did arise and was applied by the state court in disposing of the controversy. (At page 906) (Emphasis added).

And followed in *Walker v. Sauvinet,* 92 U.S. 90, 23 L. Ed. 678, U.S. La. 1875; and *Hormel v. Helvering,* 61 S. Ct. 719, 312 U.S. 552, 85 L. Ed. 1037, *cert. granted,* 61 S. Ct. 35, 311 U.S. 626, 85 L. Ed. 397.

In pre-trial motions, respondents moved to compel the discovery of various documents in response to which the state requested a protective order and an order *in limine* alleging that said information requested was excluded from discovery and/or admissibility as a result of the application of 23 U.S.C. § 409. In that motion, the State moved to limit or restrict testimony and evidence in the following particulars:

> 1. The use of reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident site, hazardous roadway conditions, or railway-highway crossings, pursuant to

> Sections 130, 144, 152 of title U.S. Code Annotated Section 409 is prohibited either as evidence or for being considered for other purposes and any action for damages filed in state or federal court.
>
> 2. All Section 144 Highway safety data is attached hereto as Exhibit A.
>
> 3. All Section 144 Bridge Documentation is attached hereto as Exhibit B.
>
> (Extracted from DOTD Motion In Limine, *see* Respondents' Appendix A, 15a).

In the testimony of Donald Ray Marson, an employee of DOTD (annexed as Petitioner's Appendix F hereinafter " Pet. App.", pages 46a *et seq.* of petitioner's application), there is a long discussion as to the identity of the evidence consisting of records and documents being offered and under whether or not said records and/or documents were subject to the exclusion of 23 U.S.C. § 409. The record is absent of any showing of any specific program. Rather, Marson's testimony is conclusionary when he indicates that all of the documents identified were produced as a result of federal funding; Marson testified that the DOTD gets "our accident data from the Department of Public Safety" (Pet App. 47a); and further on where he admits that the data in question could have "been produced for a state route that is not federally funded" (Pet App. 52a).

It is that refusal of the trial court to consider the individual documents in question and its order of a blanket exclusion, finding that § 409 applied to the case, rather than that § 409 applied to any specific documents, the identity of which documents the court did not consider, was its error. More

importantly, however, it demonstrates that there was never any showing by the DOTD of any documents produced pursuant to a safety enhancement program under 23 U.S.C. §§ 130, 144 and 152.[1]

II.

THE 1995 AMENDMENT OF 23 U.S.C. § 409, ADDING THE WORDS "OR COLLECTED" AFTER THE WORD "COMPILED", DOES NOT PRESENT ANY CHANGE IN THE LAW AND IS NOT PROPERLY BEFORE THIS COURT AS THE AMENDMENT WAS NEVER RAISED AT THE STATE COURT LEVEL; FURTHER, THAT THE AMENDMENT WOULD NOT HAVE AFFECTED THE ADMISSIBILITY OF ANY OF THE EVIDENCE PRESENTED TO THE LOWER COURTS; IN THE ALTERNATIVE, ANY SUCH CHANGE WOULD BE SUBSTANTIVE BECAUSE IT WOULD DEPRIVE PETITIONER OF STATE TORT RIGHTS.

The 1995 amendment contained in Public Law 104-59 was enacted November 28, 1995, some 25 days after the final state court action, the denial of the writ by the Louisiana Supreme Court (*see* Pet. App. 20a). As such, the issue of the construction of that amendment which adds the words "or collected" after the word "compiled" in the statute, was never raised or pled in any of the lower state courts including in the application for writ of certiorari to the Louisiana Supreme Court. Accordingly under *Hamilton Co. v. State of Massachusetts, op. cit.*, "questions not decided in the state court because not raised and presented by the

---

1. 23 U.S.C. §§ 130, 144 and 152 refers to specific programs designed respectively for railroad crossings § 130, bridge maintenance and study § 144, and safety enhancement programs § 152. For the text of §§ 152 and 409, *see* Pet. App . 38a *et seq.* Since §§ 144 and 130 are not part of the questions presented for review to this Court, they are not reproduced herein.

complaining party, will not be reexamined in this court . . ." (at page 906). On those two issues, the construction and application of 23 U.S.C. § 409, as amended by the 1995 amendment, is not properly before this Court.

However, if the 1995 amendment should be before this Court it would be noted that it would affect no change in the law (DOTD's application, page 28). In construing this statute which decision was followed by the Court of Appeals, the Louisiana Supreme Court in *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So. 2d 170 (La. 1993) stated the following:

> DOTD essentially asks this Court to transform a statute, which by its literal wording protects information *compiled* for certain purposes, into one which protects all information in DOTD's possession. We refuse. The word "compiled" indicates that information is collected into one document or composed from other sources. [*See Webster's New Collegiate Dictionary* p. 230, (1977).] The term suggests an end product, something more than unedited factual material. Moreover, privileges derogate from the system by which courts determine the truth and should not be expansively construed. *United States v. Nixon*, 418 U.S. 683, 709, 94 S.Ct. 3090, 3108 41 L.Ed.2d 1039, 1065 (1974). Section 409 creates a privilege for compilations enumerated in the statute, but *the privilege does not extend to reports and data gathered for or incorporated into such compilations.* (At page 173) (Emphasis added).

It is therefore clear to this Court whether the statute reads "compiled" or "compiled or collected" or "gathered for or incorporated into such compilations" as used by the *Wiedeman* court, that the compilations and the collections and the gatherings all in fact refer to an end product, more particularly, an end product envisioned to be compiled, collected or gathered pursuant to a program under 23 §§ 130, 144 or 152.

If the DOTD's contention is that the addition of "or collected" enlarges the amounts of said reports, schedules, surveys, lists or data, which would be excludable under 23 U.S.C. § 409, then this would be a substantive change moving beyond the realm of mere procedural rules of evidence and into a substantive field which should not be applied retroactively because it would reinstate a form of sovereign immunity, for the purpose of state highway department defense.

III.

THE DECISION OF THE STATE COURT OF APPEALS IS CORRECT IN ITS INTERPRETATION OF 23 U.S.C. § 409, AND ITS ADMISSION OF EVIDENCE INCLUDING POLICE REPORTS AND OTHER DOCUMENTS NOT COMPILED BY THE DOTD.

The decision of the State Court of Appeals is correct in its interpretation of 23 U.S.C. § 409 and its application of that statute to the facts at bar and its reversal of the Trial Court's ruling on liability. Adopting the view of *Southern Pacific Transport v. Yarnell*, 890 P.2d 611 (Ariz. 1995), *writ refused*, __ U.S. __, 116 S. Ct. 352, respondents suggest that a reading of § 409 must be an "integrated" one, reading § 409 along with the other pertinent parts of the statute to which it refers in its body. To extend it beyond the sections and programs, for which it was designed to provide protection, is to expand the privilege created

by the statute, denying all evidence alleged to be subject of the exclusion of 23 U.S.C. § 409, without an examination of the origin of that evidence.

The state Court of Appeals is correct in allowing into evidence police accident reports prepared by police departments and stored by the Department of Public Safety, the DOPS not the DOTD.

Most recently, the Arizona Supreme Court, in *Southern Pacific Transp. Co. v. Yarnell, op. cit.*, writ refused 116 S. Ct. 352, concluded after its analysis of the statute:

> It can thus be seen that each of the categories of information described in 23 U.S.C. § 409 has its origin in the programs described in 23 U.S.C. §§ 130, 144 and 152. These are words of art. This is powerful support for the proposition that the documents exempt from discovery and excluded from evidence under Section § 409 are precisely the documents described and *prepared under the authority of §§ 130, 144 and 152 and no others.* This would promote the integrity of the Federal Regulatory Scheme without compromising the integrity of the parallel state tort system. (At pages 614-615) (Emphasis added).

IIIA.

THE STATUTORY PRIVILEGE CREATED BY 23 U.S.C. § 409 SHOULD BE READ AS INTEGRATED WITH THE OTHER SECTIONS OF THAT TITLE AND THE PROGRAMS ARISING UNDER SUCH SECTIONS, NAMELY §§ 130, 144 AND 152.

It is to be noted in considering 23 U.S.C. § 409, that there are no "reports, surveys, schedules, lists or data" which are compiled under that section of the statute. Rather that section establishes a statutory privilege which excludes said reports, *et al.*, from discovery when they are:

> 1. reports, surveys, schedules, lists or data
>
> 2 compiled for the purpose of
>
> > a. identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossing, pursuant to sections 130, 144, and 152 of [Title 23] or
> >
> > b. developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.

Under such an analysis, it is clearly demonstrated that the DOTD offered no evidence whatsoever as to what safety enhancement program they were utilizing said information for; consequently in the absence of such a showing, evidence not prepared nor collected is not subject to the exclusion.

It is the oft expressed principle that the "public . . . has a right to every man's evidence except for those persons protected by a constitutional common law or statutory privilege," *United States v. Nixon,* 413 U.S. 683, 709, 94 S. Ct. 3090, 3108, 41 L. Ed. 2d 1039 (1974). Further stating, "that privileges, whether established in the Constitution, by statute, or at common law", are "neither lightly created nor expansively construed, for they are in derogation of the search for truth". (*Id.* at 710, 94 S. Ct. at 3108).

The United States District Court in *Kitts v. Norfolk and Western Railway Co.*, 152 F.R.D. 78 (S.D.W. Va. 1993), construed 23 U.S.C. § 409 stating:

> The statute does after all, contemplate protection for documents and data prepared or "compiled for the purpose" (emphasis added) of safety enhancement. It clearly *does not accord protection for documents or data prepared or compiled for some entirely separate or distinct purpose,* even if the contents of the same, are parts thereof eventually become ingredients thrown into a soup kettle with the distinct flavor of safety enhancement. (At page 81).

The DOTD's interpretation would afford protection for documents prepared for entirely distinct purposes, *i.e.,* police accident reports.

IIIB.

THE DOTD INTERPRETATION WOULD BAR CONSIDERATION OF EVIDENCE, NOT COMPILED OR COLLECTED UNDER ANY APPLICABLE STATUTORY PROVISION, PREVENTING CONSIDERATION BY THE COURT OF ADMISSIBLE EVIDENCE.

In its application herein the DOTD is requesting this Court rule as excluded from admissibility under the provisions of 23 U.S. § 409, various police accident reports forwarded to the Louisiana Department of Public Safety. Additionally, the DOTD asks that this Court extend that exclusion to the information contained in the police reports and to the review of that information by experts including experts for both the respondents and the petitioner, DOTD.

Under the decision by the Louisiana Supreme Court in *Weideman v. Dixie Elec. Membership Corp., op. cit.*, that court construed the statute and its applicability and concluded:

> Section 409 creates a privilege for compilations enumerated in the statute, but the privilege does not extend to reports and data gathered for or incorporated into such compilations. (At page 173).

The court then went on to allow as discoverable and admissible police accident reports and other raw data and at the same time, denied admissibility to surveys, applications for studies assisting, assigning priorities and projects and other compilations made for developing highway safety construction projects.

Following the decision in *Wiedeman*, the First Circuit allowed the following evidence:

> In conducting our review of the record, we considered the expert testimony as well as the improperly excluded evidence. The *individual accident reports* from 1982 to 1989 indicate that of the accidents occurring on the metal grate, *over 75%* occurred in wet weather (footnote 4). This high incidence of wet weather accidents supports the theories offered by the Doucet experts rather than the DOTD experts. (First Circuit Court Slip Opinion, Pet. App., 7a) (Emphasis added).

The same rule would allow the admissibility of various bridge tender reports. The First Circuit stated:

> Another essential document excluded by the trial judge, was a May 13, 1986 *letter from bridge tender* Alex Kinchen. This letter was contained in the excluded damage reports and complaint records. In the handwritten letter, Kinchen states "*Evertime [sic] it raines [sic] someone is spinning around on the bridge* northbound usually they keep going." This letter supports the Doucets' contention that the number of wet weather accidents on the grate is even higher than the number indicated in the individual accident reports. (First Circuit Court Slip Opinion, Pet. App. at 7a) (Emphasis added).

That quote also allowed in an inventory showing the erosion of the projectile points:

> A third document, also contained in the excluded damage reports and complain records, is a May 11, 1992 inventory of steel grate compiled by Dennis Burke, a DOTD district bridge maintenance engineer. The inventory reflects the various types of unused steel grate available in Burke's district. On May 4, 1992, Burke made the *following notation on the inventory sheet, "this is the pattern [of metal grate]* on N & S draw @ US 11. FAPP *[for all practical purposes] projections are gone"*. The note refers to the 5/16 inch projections which protrude slightly above the plane of the metal sheet. The notation clearly supports the contention of the Doucet experts who stated that the metal grate on the Highway 11 bridge was worn smooth. On the other hand, the note directly contradicts statements made by the DOTD experts. One DOTD expert stated that the "traction lugs" still existed on the grate. Although a second expert stated that there was some "polishing" of the grid, he later suggested that the projection points never existed and, therefore, could not be missing. By admission of DOTD's own maintenance engineer, the projection points had existed but were worn smooth. (First Circuit Slip Opinion, Pet. App. 7a-8a) (Emphasis added).

The DOTD's contention is that all of the facts referred to by the First Circuit hereinabove, improperly excluded by the trial

court, are included within the meaning of "reports, surveys, schedules, lists or data" which would be protected under 23 U.S.C. § 409. That same First Circuit speaking some years earlier indicated "this enumeration suggests something more than simple factual information that [a state department of transportation] has gathered", *Martinolich v. Southern Pacific Transp. Co.*, 532 So. 2d 435, 439 (La. App. 1 Cir. 1988).

The Arizona Supreme Court in *Southern Pacific Transp. Co. v. Yarnell, op. cit.* concluded that the words "reports, surveys, schedules, lists or data" are terms of art which refer to more than raw facts. Those courts rejected the argument that the word "data" would encompass such facts finding that not even the word data is strictly synonymous with "fact."[2]

---

2. *Yarnell* Opposition Brief at page 11:

> *Webster's Ninth Collegiate Dictionary* defines the terms as follows:
>
> > **data**: factual information (as measurements or statistics) used as a basis for reasoning, discussion or calculation, the [data] is plentiful and easily available - H.A. Gleason, Jr.> <comprehensive [data] on economic growth has been published - N.H. Jacoby>
> >
> > **fact**: a thing done: as a: CRIME <accessory after the [fact]> b *obs*: FEAT c *archaic*: ACTION 2 *archaic*: PERFORMANCE, DOING 3: the quality of being actual: ACTUALITY <a question of [fact] hinges on evidence> 4 a: something that has actual existence <space travel is now a [fact]> b: an actual occurrence: EVENT <prove the [fact] of damage> 5: a piece of information presented as having objective reality - in fact: in truth: ACTUALLY

More persuasive is the use of the phrase "reports, surveys, schedules, lists or data" in the statute itself. The modification of said compilations or collections of data is for work performed pursuant to specific sections, and the work product generated out of those sections. As such, they become terms of art as used in § 409. For that reason, it must be demonstrated that such a report and/or data is gathered pursuant to such a section and the absence of which the privilege should be limited.

Regarding the retrospective effect of the 1995 amendment, petitioner cites the case of *Bradley v. School Board of City of Richmond,* 416 U.S. 696, 711, 94 S. Ct. 2006, 2016, 40 L. Ed. 2d 476, 488 (1974) for the proposition that a change in federal procedural law applies retroactively, absent contrary legislative mandate or manifest injustice. The case at bar, as did *Bradley,* presents a unique consideration of what effect is given to a change in law which takes place once a ruling has been made and while a case is on direct review. A reading of *Bradley* indicates that the philosophical underpinnings of that decision is the Supreme Court holding in 1801 by Chief Justice Marshall in *United States v. Schooner Peggy,* 1 Cranch 103, 2 L.Ed. 49 (1801). In *Schooner Peggy,* the court noted that, if "subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs", the new law must be obeyed, *id.* at 110; but the court qualified that obligation recognizing that, "it is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties.." *Id.* at 110.

It is to be noted that the *Bradley* rule has by and large been applied in instances which involve incidental actions, in *Bradley* an action for attorneys fees in a desegregation case prior to the federal enactment of the authority to award such attorneys fees. The cases which followed *Bradley* have dealt with sexual

harassment[3], environmental issues[4], and other civil rights claims.[5]

Much more apropos is the Supreme Court rulings based on *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988) which stated, "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result" (at page 208, at page 471, at page 493). In *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886 (D.C. Cir. 1992), the court goes into an extensive history of the development of the Civil Rights Act and more particularly inquiry into congressional intent, legislative history, and judicial history. Therein it was noted:

> Finally, the *Bradley* court implied that such manifest injustice would occur with a retrospective application would impose "new and unanticipated obligations . . . without notice or an opportunity to be heard". (416 U.S. at 720, 94 S.Ct. at 2021.)

This Court also cites Justice Scalia writing in the *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) wherein the court wrote, "[d]uring . . . more than 150 years of doctrinal certainty," the Supreme Court denied retroactive application to new statutory law except when "the statute affirmatively so required" citing *Kaiser* at 844, quoted in *Gersman* at 896, further stating:

---

3. *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994).

4. *Alyeska Pipeline Service Co. v. Wilderness Society*, 95 S. Ct. 1612, 421 U.S. 210 (1975).

5. *Fox v. Parker*, 626 F.2d 351 (1980).

> *Schooner Peggy* stands for the proposition that only when congress *"plainly says"* that a legislation has retroactive effect are courts to depart from "the ordinary presumption which courts will 'struggle hard' to apply" against retroactivity, *Id.* at 846-847, 110 S.Ct. at 1582 (emphasis in original). (*Gersman* at 896).

The court also quotes its approval of the following from *Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992):

> The measure of manifest injustice under *Bradley* is not controlled by formal labels of substantive or remedial changes. Instead we focus on the practical effects the amendments have upon the settled expectations of the parties. *Id.*, 968 F.2d at 433 cited from *Gersman* at page 900.

Although the presumption would have "granted retroactivity", it was pointed out that even if it did its own built in exception for "manifest injustice" would lead to prospective application of the amendment.

It is respectfully submitted that the *Bradley* rule is misstated when the built in exceptions contained therein concerning manifest injustice are not considered. More particularly, the focus on the practical effect the amendments have upon the settled expectations of the parties is the deciding factor. For those reasons the amendment before this Court should not be applied to the case at bar, a final state court judgment when the amendment is enacted.

IIIC.

THE EVIDENCE SOUGHT TO BE EXCLUDED WAS PREPARED BY STATE EXPERTS AND NOT USED FOR ANY PURPOSE PURSUANT TO 23 U.S.C. §§ 130, 144 AND/OR 152.

It has been demonstrated in this Court that the police reports in question were not prepared in any way by any state highway employee, but by police agencies in the area. It has also become clear that said police reports were not collected by the DOTD, but by the Department of Public Safety, which then made said compilations available to various parties requesting same. The DOTD, however, argues in its brief, at page 12, that the statute as it is written "excludes all data, not just compiled data".

From those police accident reports, Jim Clary on behalf of respondents, and Jack Humphries and Larry Peterson on behalf of petitioners, each compiled an analysis of said accident reports with both sides concluding that a review of such accident reports indicated a highly dangerous 75% increase in the incidents of accidents in wet conditions rather than dry conditions (Court of Appeals Decision, Pet. App. 7a). The First Circuit Court of Appeal allowed it into evidence stating "because the spreadsheet was prepared using individual accident reports, it was not compiled under Section 409, the spreadsheet should have been included in evidence, *Doucet vs Champagne and DOTD.*" (Pet. App. 6a at footnote 3).

IIID.

THE CUMULATIVE EFFECT OF THE EVIDENCE, INCLUDING POLICE REPORTS, BRIDGE TENDER COMPLAINTS, INDEPENDENT OBSERVATIONS BY EXPERTS, ADDUCED AT TRIAL AS WELL AS OTHER ADMISSIBLE EVIDENCE CONFIRMS THE COURT'S RULING.

As the result of the "blanket" exclusion of any and all material asserted to be privileged under 23 U.S.C. § 409 by the trial court, that court did not consider the incidence of wet accidents versus dry accidents so demonstrated by a spreadsheet prepared by independent experts, and derived by an analysis of the accidents by experts for both sides. That incidence highlights the effect of the various conditions which were found to exist on this bridge as a result of misuse and lack of maintenance and wear and tear over the bridge life, which the DOTD did not deny but which they asserted was not a factor in this accident, a conclusion belied by the aforementioned incidence of wet to dry accidents. Those deficiencies included the following:

1. A total lack of maintenance on the bridge since anyone at the DOTD can remember, including the head of the department, an employee of more than 20 years (*see* testimony of District O-2 administrator, Resp. App. A, 13a; further is Robert Roth, maintenance manager, Resp. App. 3a, 4a, 6a);

2. The First Circuit's confirmation that the police officer investigating the accident was of the opinion that the grid surface itself was the cause of the accident, quoting the officer "(at) the time of the accident the roadway was wet, which made the grid itself very slippery, which I think that a major factor in the accident itself" (First Circuit Court Decision, Pet. App. 10a);

3. Skid testing over a five year period with traction measurements equivalent to those for ice and snow (*see* testimony of Chris Shapley, DOTD expert, Resp. App. 11a and Frank Griffith, Resp. App. 2a);

4. Substantial rutting and pooling of water in the asphalt roadway (*see* testimony of James Clary, Resp. App. 8a);

5. Surface discontinuities approaching the grid surface of the bridge, including many different co-efficients of friction resulting from the rutting asphalt, pooling water, smooth/solid metal surface, asphalt filled grid surface which held water, rutting of the grid roadway itself, and wearing down of projectile points all of which effected the co-efficient of friction and therefore traction and the steering ability of the drivers on such roadway (*see* testimony of James Clary, Resp. App. 9a); and,

6. Failing to replace the bridge grid surface (*see* testimony of James Clary, Resp. App. 9a, 10a).

All of which deficiencies contribute to inadequate steering conditions on the grid surface.

All of those same deficiencies were found to have existed in the case of *Cousins v. Berteaut*, 22nd JDC case number 89-2066 (Pet. App. 71a, *et seq.*). Judge Fitzsimmons found those items enumerated above to have existed in 1986 and that the deficiencies mentioned hereinabove were responsible for the lack of adequate steering conditions on the bridge. The trial judge therein stated:

> All of these minor factors are small when they are viewed in isolation. When viewed

> together, *each functions like a piece of mosaic, to ultimately form* a complete picture. All point to and emphasize a common centerpiece: namely, these factors create *a wet weather hazardous condition on the bridge which was known to the State of Louisiana*, and which could have been corrected any time since 1985. (Pet. App. 71a, *et seq.*) (Emphasis added).

It is therefore respectfully submitted that the First Circuit Court of Appeals decision herein is correct both in its interpretation of 23 U.S.C. § 409, its consideration of documents incorrectly excluded by the trial court, the evidence of the abject refusal by the DOTD to make any effort to comply with any safety standards or even its own maintenance standards regarding this bridge and the confirmation of dangerous existence by the incidence of the 75 to 25 ratio of wet to dry accidents.

CONCLUSION

If the 1995 amendment is not before this Court as it is suggested earlier, then this writ application is a duplicate of that submitted in *Southern Pacific Transp. Co. v. Yarnell* which writ application was denied (116 S. Ct. 352 on October 16, 1995). If Congress had intended by that amendment to exclude from evidence police reports, observations of independent witnesses and the analysis of experts, it could have spoken to that. As recently as November 28, 1995 it did not. Truly the privilege, accorded under 23 U.S.C. § 409 is limited to "reports, surveys, schedules, lists or data", developed pursuant to specific highway safety enhancement programs, specified in 23 U.S.C. §§ 130, 144 and 152.

Without a clear statement from the Congress, that privilege should not be extended beyond an integrated reading of 23 U.S.C. § 409. Traditional records and evidence including police reports of accidents, observations of independent witnesses, and independent analysis of experts are not now subject to the exclusionary rule. Moreover, the record is replete with examples of defective conditions allowed to exist without any showing of any maintenance efforts being made by the DOTD. That the amendment should not be granted any retroactive effect is clear when considered upon the facts of this case and upon the settled expectations of party at the time it was tried.

While the incidence of accidents, revealed by the analysis of police reports, demonstrates a highly dangerous condition according to every highway standard both nationally and the DOTD's own standard, the incidence of accidents merely confirms the defective condition which would was demonstrated to have existed at the time of this accident.

It is respectfully submitted that the writ be denied.

Respectfully submitted,

DOUGLAS MICHAEL SCHMIDT
Counsel of Record
WAYNE E. GARRETT
Of Counsel
LAW OFFICES OF
DOUG SCHMIDT, APLC
Attorneys for Respondents
335 City Park Avenue
New Orleans, Louisiana 70119
(504) 482-5711

APPENDIX A — EXCERPTED TRANSCRIPT DATED JULY 29, 1993

TWENTY-SECOND JUDICIAL DISTRICT COURT

PARISH OF ST. TAMMANY

STATE OF LOUISIANA

NO. 92-11043-1

PAUL DOUCET, ET AL

VERSUS

HERBERT J. CHAMPAGNE, JR.

VOL. I

TRANSCRIPT OF PROCEEDINGS taken before the Honorable A. Clayton James, Judge Presiding, Division E, Twenty-Second Judicial District Court, Parish of St. Tammany, State of Louisiana, on July 29, 1993, Covington, Louisiana.

APPEARANCES:

DOUGLAS M. SCHMIDT, ESQUIRE,
PETER R. BORSTELL, ESQUIRE AND
WAYNE E. GARRETT, ESQUIRE
ATTORNEYS FOR PLAINTIFFS

MS. NANCY YEAGER
ATTORNEY FOR MR. CHAMPAGNE

Appendix A

STEPHEN J. CAIRE, ESQUIRE AND
T. GORDON SANDERS, ESQUIRE
ATTORNEYS FOR DOTD

REPORTED BY:

DEBBIE M. MURRAY, C.S.R.
OFFICIAL COURT REPORTER

* * *

[554] numbers of .33 on the grid, so this is well within the comfortable measurements that we have here. Tracked snow .37, .35, .32. That is untracked snow. Tracked snow is .37, .31, .36, and so on.

The point of this is that regardless of what highway engineers say, what state governments say, what anybody says, that here is credible evidence that we have a bridge with traction very close to that of snow. And that is, as I indicated in the AASHTO material, it's up to the public to decide and the courts to decide whether or not we want people driving on packed snow.

MR. CAIRE:

Your Honor, I'm not objecting. May I ask him to give me the name of that?

THE WITNESS:

Yes, sir. It's around the courtroom it is in a book that we have. This is an article by — pardon, this page is cut off. The title is, Reconstructing Collisions Involving Ice and Slippery

Surfaces, the S.A.E. number is 930896. It's on page 185 of the book. That is — yes, that book. I think that is the same.

MR . CAIRE:

Page what?

THE WITNESS:

On 185. There is only, I think along these lines one other thing that will help us understand what is going on there. And I have a document that was supplied evidently by Mr. Blaschke in the Cousins case. I haven't seen

* * *

[631] Which is a Louisiana Department of Transportation and Development bridge maintenance section generated inspection schedule which contains references to the —

MR. SANDERS:

The actual bridge inspections.

MR. GARRETT:

The actual bridge, well, it contains a reference to when the bridge is scheduled by them to be inspected and when it was last inspected.

THE COURT:

Let it come into the record in the form of a proffer, not as evidence.

MR. GARRETT:

Okay. And again there are more of these than just one, Your Honor. I offer them all in globo.

EXAMINATION BY MR. SCHMIDT:

Q. During your twenty-two years with the Department of Transportation do you recall whether the steel grid was ever replaced on the Highway 11 Bridge?

A. I do not recall it ever having been replaced.

Q. How old is that grid?

A. I don't know.

Q. Can you give me an estimate as you did in your deposition?

A. No, I don't recall estimating the age of the grid in my deposition. What I think I said was it is unlikely that that was the original grid, given that the bridge is as old as it is.

Q. Are there still transverse bars missing from the grid floor?

[632] A. Yes.

Q. Since the Bush case have any been replaced?

A. Not to my knowledge.

Appendix A

Q. Has anything been done on the bridge to increase the coefficient of friction?

MR. SANDERS:

Your Honor, I am going to object to that question, without a foundation being laid.

THE COURT:

Overrule the objection. I think this man can answer that.

THE WITNESS:

No.

EXAMINATION BY MR. SCHMIDT:

Q. Have they replaced the projection points that were on the bridge at one time?

MR. SANDERS:

Objection. Assumes facts not in evidence.

EXAMINATION BY MR. SCHMIDT:

Q. Do you know if that was —

THE COURT:

Overruled.

Appendix A

THE WITNESS:

What do you mean by projection points? I am —

EXAMINATION BY MR. SCIIMIDT:

Q. They have little bars that are stuck up between the grids to increase the coefficient of friction. Are you not aware that was on the original grid?

A. No, I am not aware of that.

Q. Have they done anything since that to increase the width of the shoulders on the bridge since the Bush case?

A. No.

* * *

[637] closing of the grid at all?

A. Yes. You actually got two trunnions, but the main trunnion is the hinge on which the movable leaf is supported which allows it to open like a door.

Q. And they would cause that — is that what comes in when it locks together?

A. No, no. The trunnion is the — if the bridge leaf — if the bridge moves like a door. (Indicating.) It has that hinge. The trunnion is the pin on the hinge.

Q. So that has nothing to do with the sheets meeting together?

A. Nothing whatsoever. There is also a counterweight trunnion. I don't know which trunnion you're talking about but —

Q. That is all right. That is sufficient. Thank you. When was the last time they resurfaced the Highway 11 Bridge, the DOTD? Do you remember what you told us in your deposition?

A. I don't remember. I think I looked it up at the time of the deposition. It is — I don't know. If I looked it up at the time of the deposition that is the correct date, but I don't recall at this time.

Q. Was it more than Fifteen years ago?

MR. SANDERS:

Your Honor, I will object. He said he doesn't know and if it is in his deposition I mean he —

THE COURT:

I sustain the objection.

EXAMINATION BY MR. SCHMIDT:

Q. Do you know if it has been done more than once since you have been with DOTD?

* * *

Appendix A

[646] MR. SCHMIDT:

D-10.

EXAMINATION BY MR. SCHMIDT:

Q. Would you describe what these show to you?

A. These are pictures taken near the North and South Drawbridge and it shows the condition of the road leading to the drawbridge. It shows the condition of some of the joints in the roadway on the vents leading to the two drawbridges. It shows standing water on the road It shows a considerable amount of handrail damage. This one shows the leg of a passenger I had in the car. This one shows a foot. This one shows some of the guardrail that has been damaged. Some of it is missing and again you can see the joints leading to the steel grid floor. Another one just about the same thing and this is —

Q. That is damage onto the railings?

A. This is damage to the guardrail. It shows the type of temporary repairs that were made. This is at the draw showing some pavement repair and just the condition of the pavement and the joints and it also allows broken handrails.

Q. You said repaired — was it even when you got to see it or was it —

A. You can see that there are some surface irregularities in the paving. This one just shows water standing in the ruts and also along the gutter you can see the scuffers along the curb. Those are little black spots and they are pretty well inoperative.

Appendix A

Q. My next question was what did you observe regarding Highway 11, but have you gone over that with the pictures pretty much or is there something you wanted to add?

A. No, sir. I observed at the — I don't have a picture of the grids in there because pictures that were already

* * *

[662] me that you get quite a bit of water beneath the asphalt and you are pumping out patches. The — I saw some patches that look fairly fresh on the bridge and a lot of them are coming up.

Q. Would those patches be noticeable to a driver?

A. When you run over them you notice them, yes.

Q. Would they be obvious to a driver?

A. If you are looking for them. I hate to say would it be obvious to someone else, because I am out there looking for them. I see them readily.

Q. Is there a remedy for this?

A. The remedy for it would be better maintenance or this asphalt is what from '77 to '93? It is what, sixteen years old. It is pretty old asphalt.

Q. What have you observed about the steel grid at the North Draw?

A. The steel grid at the North Draw has some transverse

bars missing. It — when you go from joint to joint or from vent to vent the longitudinals don't lineup and where the wheels have passed you have the two inch bars, which are four inches apart. And these two inch bars have the tops worn off where the, it becomes smooth. As I recall from the standard the serrations are about an eighth of an inch deep. Most of those are gone. So you have little semicircular pieces of metal that if you, they are six inches apart and if you get your wheel in there it will tend to make you track. When you get to the next joint and it's not lined up then you are going to seek a track until it tracks again. That is what, I think, gives you the uneasy feeling of your car moving side to side.

Q. As an expert in the highway design, safety and engineering what is your opinion as to the steel grid on [663] the North Draw?

A. I think it is worn out.

Q. Does it need replacement?

A. I think so.

Q. Have you, what would be the cost? Have you checked into the cost of replacement or can you estimate the cost of replacement?

A. Yes, sir.

Q. What would that be?

A. I contacted some people in bridge, the bridge business and I was given an estimate of —

MR. SANDERS:

Your Honor, I am going to object to any hearsay testimony about what someone else may have told him.

THE COURT:

Well, I think this is the type information that experts would normally gather and rely upon and I think that is an exception to the hearsay rule and I will let it in. Overruled. You may answer.

THE WITNESS:

I was given a figure of $32.00 a square foot to, for new grating. If you were putting on new grating on a bare beam. I was given a price of between $5.00 and $50.00 a square foot to remove and replace and this came from two bridge contractors and I compared it with the deposition of one of the State's bridge design engineers. He estimates $50.00 a square foot.

EXAMINATION BY MR. SCHMIDT:

Q. Do you know how many square foot the bridge is

* * *

[747] A. I wasn't measuring the skid numbers. I was measuring the —

Q. I am asking the question.

A. The number is what it is.

Q. Right. Is the skid number on here 33.1?

A. That is what the number says.

Q. Is it 33.1 skid number slick? Is it like ice?

A. Oh, it's not like ice, no.

Q. Is it like crushed snow or impacted snow if the ice stays on it?

A. What tires are you going to use? It makes a — I mean snow tires do quite well. You might get up to .33 with snow tires or chains.

Q. Was there snow tires or chains in this accident?

A. The snow — there is no snow or ice in this accident. So I don't see the point.

Q. Did you — were you here when Mr. Roth testified?

A. I think so.

Q. Were you here?

A. He is that gentleman over there, yes.

Q. Were you here when he said, I asked about the article and he said the grid work on draw bridge is too light. The heavy winds are causing it to rise a few inches?

A. I thought that was funny, yes.

Q. Why did you think that was funny?

A. Do you want me to show you?

Q. No. I just want to ask what you think

A. The idea.

Q. What is so funny about it?

A. Because the guy that said that, all right, obviously is not an engineer or physicist. When you calculate the pressure differential due to flow blockage under a bridge

* * *

[778] A. I am not aware of any grid replacement. Is that what you're talking about the grid?

Q. Yes, sir.

A. We are talking about the steel deck on the movable span.

Q. Yes, sir.

A. No, I am not aware of having replaced the steel grid.

Q. Did you repair any of the missing parts in the steel grid?

A. There may have been, but I wouldn't be aware of it. They would be handled by our district maintenance engineer.

Q. So you would go by his testimony on as far as that?

A. He is in charge of all district maintenance and more familiar with the maintenance activities than I.

Q. Did you do anything to increase the coefficient of friction on the bridge? Did you lay new asphalt? Was new asphalt laid on the bridge or anything?

MR. SANDERS:

Your Honor, I am going to object to the form of that question. He asked about three parts to it. I don t know which one.

THE COURT:

I overrule the objection. I didn't hear three parts. You may answer.

THE WITNESS:

What specifically are you?

EXAMINATION BY MR. SCHMIDT:

Q. The previous overlay. Did they take up all the old asphalt and redo the bridge?

A. To my knowledge we have had no overlay projects on the bridge.

Q. How long has that been since? Okay, before I ask

* * *

APPENDIX B — MOTION IN LIMINE FILED JUNE 4, 1993

NO: 92-11043 DIV "E"

22ND JUDICIAL DISTRICT COURT

PARISH OF ST. TAMMANY

STATE OF LOUISIANA

PAUL DOUCET, ET AL

VERSUS

HERBERT CHAMPAGNE, JR., ET AL

FILED: _____ _____

DEPUTY CLERK

MOTION IN LIMINE

NOW INTO COURT, through undersigned counsel, comes the Louisiana Department of Transportation and Development, and moves this Honorable Court to limit or restrict testimony and evidence proposed to be offered by or on behalf of plaintiffs in the following particulars:

1. The use of reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident site, hazardous roadway conditions, or railway-highway crossings, pursuant to Sections 130, 144, 152 of title 23 U.S. Code Annotated Section 409 is

prohibited either as evidence or for being considered for other purposes and any action for damages filed in state or federal court.

2. All Section 144 Highway safety data attached hereto as Exhibit A.

3. All Section 144 Bridge Documentation attached hereto as Exhibit B.

WHEREFORE, movers pray that plaintiff be ordered to show cause why the foregoing Motion in Limine should not be granted and after due proceedings, said motion be granted.

Respectfully submitted,

RICHARD P. IEYOUB
ATTORNEY GENERAL

STEPHEN J. CAIRE
SPECIAL ASSISTANT ATTORNEY GENERAL
REED & CAIRE
ATTORNEYS AT LAW
71206 HENDRY AVENUE
COVINGTON, LA 70433
(504) 892-9295

BY: s/ T. Gordon Sanders
T. GORDO SANDERS
ATTORNEY

Appendix B

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all opposing counsel, by placing a copy of same in the U.S. Mail, postage prepaid,

this 4th day of June, 1993

s/ T. Gordon Sanders
T. Gordon Sanders Attorney
Attorney

Appendix B

ORDER

IT IS HEREBY ORDERED, that plaintiffs, Paul Doucet, Sr., Debra Doucet, Russell Doucet, Michael Doucet and third party plaintiff Herbert Champagne, Jr. appear on the 14 day of June, 1993, to show cause why the Motion in Limine should not be granted and that plaintiffs and their experts, should not be prohibited from entering into evidence, referring to, or using in any manner or purpose, any report, survey, schedule, list, or data compiled for the purpose of identifying, or evaluating, or planning safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to Sections 130, 144, 152 of title 23 U.S. Code Annotated Section 409 or as attached as per Exhibit A and B.

SO ORDERED, this __ day of _____, 1993, Covington, Louisiana.

_____

JUDGE

PLEASE SERVE NOTICE OF HEARING ON

Douglas M. Schmidt
Peter R. Borstell
335 City Park Avenue
New Orleans, LA 70119

Nancy Yeager
501 N. Columbia
Mandeville, LA 70448

Appendix B

EXHIBIT A

BRIDGE INSPECTION REPORTS WITH ATTACHMENTS

Documents	Approval date	No. of pages
1. Structural inventory and appraisal report	12/3/86	1

Appendix B

EXHIBIT B

HIGHWAY ACCIDENT SAFETY DATA

Documents	Approval date	No. of pages
1. Accident data complied by mile post pursuant to 23 US 409 to determine abnormal accident locations	all years	
2. Correspondence of Thomas Richardson to Louis Garrido and attached computerized listing for accident data for the years 1976 thru 1985	12/1/86	34
3. Interdepartment memorandum from Louis Garrido to Henry Barousse	8/15/88	1

APPENDIX C — JUDGMENT OF THE 22ND JUDICIAL DISTRICT COURT, STATE OF LOUISIANA DATED MAY 13, 1993

NO: 92-11043 DIV "E"

22ND JUDICIAL DISTRICT COURT

PARISH OF ST. TAMMANY

STATE OF LOUISIANA

PAUL DOUCET, ET AL

VERSUS

HERBERT CHAMPAGNE, JR., ET AL

FILED May 12, 1993 Carol King
DEPUTY CLERK

JUDGMENT

This matter came on for hearing before this Honorable Court on the 10th day of May, 1993 on a motion in limine to exclude certain reports filed by the defendant, Department of Transportation and Development. Present were:

Peter R. Borstell and Wayne E. Garrett, attorneys for Paul Doucet, Russell Doucet and Michael Doucet and their spouses, and

T. Gordon Sanders, Reed & Caire, attorney for the Louisiana Department of Transportation and Development.

Appendix C

The Court having reviewed the evidence offered, the oral argument of counsel, the memoranda submitted and the record of this matter rules as follows:

IT IS ORDERED ADJUDGED AND DECREED that the Bridge Inspection Report's approved July 26, 193, May 7, 1984, May 14, 1985, August 2, 1989 and November 5, 1991 and the lydrographic survey dated February 1, 1991, all submitted as State Exhibit "A" at the hearing of this matter are inadmissible and nondiscoverable pursuant to the provisions of 23 USCA 409.

JUDGMENT READ, RENDERED AND SIGNED this 13 day of May, 1993 at Covington Louisiana.

s/ A. Clayton James
JUDGE A. CLAYTON JAMES
DISTRICT COURT JUDGE, 22ND JDC

[stamped]
A TRUE COPY
Prepared and submitted by:
T. Gordon Sanders
La. Bar No. 11705
(504) 892-9295

[stamped]
s/ Carol King
DY. CLERK 22nd Jud. Dist. Court
ST. TAMMANY PARISH